

2003

State of Utah v. Ron Dennis Shepherd

Utah Court of Appeals

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Recommended Citation

Legal Brief, *State of Utah v. Ron Dennis Shepherd*, No. 20030863 (Utah Court of Appeals, 2003).
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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Appellee/Plaintiff,

vs.

RON DENNIS SHEPHERD,

Appellant/Defendant.

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Appeal Number 20030863CA

ON APPEAL FROM THE CONVICTION AND JUDGMENT ENTERED BY THE FOURTH
JUDICIAL DISTRICT COURT, WASATCH COUNTY, STATE OF UTAH
HONORABLE DONALD J. EYRE PRESIDING

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FILED
UTAH APPELLATE COURTS
MAY 26 2004

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PARTIES TO THE PROCEEDINGS

All of the parties in the proceedings below are listed in the caption of this appeal.

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PRIOR OR RELATED APPEALS

There are no prior or related appeals in this matter.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Rule 3 of the UTAH RULES OF APPELLATE PROCEDURE and UTAH CODE ANN. §78-2a-2(e) (1953) *as amended*.

ISSUES PRESENTED FOR REVIEW

- I. WHETHER THE TRIAL COURT VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS UNDER WHEN IT ADMITTED AN UNRELIABLE OUT OF COURT IDENTIFICATION OF THE DEFENDANT.

Standard of Review: Whether the court improperly admitted evidence concerning an out of court identification of the Defendant is a question of law. *State v. Ramirez*, 817 P.2d 774, 781, n.3 (Utah 1991) ("Whether a piece of evidence is admissible is a question of law[.]). This Court must necessarily "review the record evidence and determine from the totality of the circumstances whether the admission of the identification is consistent with the due process guarantees of article 1, section 7." *Id.* at 781. In so doing, the Court of Appeals will defer to the trial court's findings of fact and will view them "in the light most favorable to the trial court's decision to admit[.]" *Id.* at 782. However, whether those facts are "sufficient to demonstrate reliability is a question of law, which [the Court] review[s] for correctness." *Id.*

Preserved Below: This issue was raised by Appellant and considered by the trial court pursuant to the Appellant's Motion to Suppress Eyewitness Identifications. R. 54-63.

II. WHETHER THE DEFENDANT'S TRIAL COUNSEL WAS SO INEFFECTIVE AS TO WARRANT A REVERSAL.

Standard of Review: Whether the Appellant's trial counsel's failure to follow through with providing requested information to the trial court in connection with the Appellant's request for an eyewitness identification expert constitutes ineffective assistance of counsel is based on the record presented and can only be considered if "the record is adequate to permit a decision." *State v. Garrett*, 849 P.2d 578, 580 (Utah App.), cert. denied, 860 P.2d 943 (Utah 1993). In looking at the record, the Court "must decide whether the defendant was deprived of effective assistance of counsel as a matter of law." *State v. Tennyson*, 850 P.2d 461, 466 (Utah App. 1993). However, this Court's review of "trial counsel's performance" is highly deferential. *Id.*

Preserved Below: This issue was not raised below. However, this issue is an exception to the preservation rule. See *State v. Irwin*, 924 P.2d 5, 7 (Utah App. 1996).

DETERMINATIVE STATUTORY OR CONSTITUTIONAL PROVISIONS

Utah Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of

the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UTAH CONST. art. 1, §7.

United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

UNITED STATES CONST. Fifth Amendment made applicable to the State of Utah by the Fourteen Amendment to the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CONST. Fourteenth Amendment, §1

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONST. Sixth Amendment

STATEMENT OF THE CASE

Nature of the Case

Wasatch County, State of Utah filed criminal charges against the Appellant on June 28, 2002. R. 6. Following a preliminary hearing, the Defendant was bound over for trial. A jury trial was held on June 30, 2003 and July 1, 2003. The jury deliberated and returned their verdict on July 1, 2003 finding the Appellant guilty of burglary, a second degree felony and theft, a class B misdemeanor. The Defendant was acquitted of the charge of possession of a controlled substance in a drug free zone. R. 193.

Course of Proceedings

The State of Utah, by and through Wasatch County filed criminal charged against Ron Dennis Shepherd on June 28, 2002. R. 6. Originally, four counts were filed: burglary, a second degree felony; possession or use of a controlled substance in a drug free zone, a second degree felony; theft, a class B misdemeanor; and possession of drug paraphernalia, a class B misdemeanor. R. 6. A warrant was issued for the arrest of Mr. Shepherd. R. 8. Mr. Shepherd appeared before the trial court and a public defender was appointed. R. 21-24. A preliminary hearing was held on November 13, 2002. R. 51, 223. Mr. Shepherd was bound over for trial and entered a plea of not guilty on all charges. R. 50. Mr. Shepherd filed a Motion to Suppress Identification By State's Witnesses" and a supporting memorandum. R. 55, 63. Mr. Shepherd

also filed a request for approval to obtain an eyewitness expert to testify about the problems associated with eyewitness testimony. R. . After a hearing, the trial court denied Mr. Shepherd's motion to suppress. R. 110. However, the trial court did order Mr. Shepherd's counsel to submit the information on the eyewitness testimony expert to determine who would pay for it. R. 110, 131. The Court entered "Findings of Fact, Conclusions of Law, And Order Denying Defendants Motion to Suppress Eyewitness Identification". R. 136. Shortly thereafter, a two day jury trial was held and Mr. Shepherd was convicted. R. 193. Mr. Shepherd was sentenced by the trial court on September 26, 2003. R. 210.

Disposition of Case in Trial Court

The Defendant was convicted by a jury following a two day trial held on June 30, 2003 and July 1, 2003.

Statement of Relevant Facts

Burglary of Mr. Hartman's Home

1. On June 26, 2002, the house of Midway, Utah resident, Mark Hartman, was burglarized. While Mr. Hartman has been away on business, he was having some remodeling done at his home. R. 256:70. At trial, Mr. Hartman could not recall where he had been away on business. R. 256:94. On his way home from the airport, Mr. Hartman stopped at his ex-wife's home to pick up two of his children. R. 256:71. By this time it was dark and very early in the morning, about 12:10 a.m. R. 256:71. The three of them

proceeded to Mr. Hartman's house a short distance away. Mr. Hartman pulled his vehicle up near his house and he and his two children exited the vehicle and proceeded around the house. R. 256:73.

2. As Mr. Hartman approached the back door of his house, a man came out of the house. R. 256:74. This man took off running north through some other nearby homes that were under construction. R. 256:75. Mr. Hartman ran after this man but was unable to catch him. R. 256:75. Mr. Hartman then returned to his house where his two children were waiting on the porch. R. 256:76.

3. Mr. Hartman and his children then entered the home. R. 256:76. As they entered, they saw that the refrigerator, which was sitting in the middle of the room, had both of its doors open. A gallon of milk was sitting on top of the refrigerator. R. 256:76. Mr. Hartman and his children then decided to take a look around the house. R. 256:77. They proceeded up the stairs where they noticed that Mr. Hartman's computer was sitting in the hallway. R. 256:77. This is not where it had been left. It had been in Mr. Hartman's bedroom. R. 256:76. They then entered Mr. Hartman's bedroom to find that the drawers had been emptied and the clothes in the closet had been thrown to the floor. R. 256:77. This is not the way that Mr. Hartman had left his bedroom. R. 256:77. After seeing the mess, Mr. Hartman suggested

that they leave the house and go outside to call the police. R. 256:78.

4. Once they were outside, Mr. Hartman called 911. R. 256:78. As he was completing the call, Mr. Hartman saw another man exit his house through the back door. R. 256:78. This man was wearing a t-shirt and shorts and had a towel over his head. The man was holding the towel under his chin with one of his hands. R. 256:79. Mr. Hartman could not recall the color of the shorts or t-shirt at trial. R. 256:95. Mr. Hartman could not see the man's face at this time. It was dark and there was no illumination. R. 256:79. Mr. Hartman yelled at the man and the man yelled back at him. R. 256:79-80. The man also made a gesture at Mr. Hartman as though he had a weapon. R. 256:80. The man was waving his arm and Mr. Hartman could not tell what was in the man's hand. R. 256:80. It was dark and Mr. Hartman could not ascertain what was in the man's hand. R. 256:80. However, Mr. Hartman believed that the man was brandishing a gun. R. 256:80.

5. Mr. Hartman then told his children to return to the vehicle which they did. R. 256:80-81. Mr. Hartman then proceeded to back up toward the car while keeping his eyes on the man. R. 256:81. Once Mr. Hartman reached the edge of the garage, he dashed for his vehicle and got inside it. R. 256:81. Mr. Hartman intended to drive away when the man came around the house on a bicycle. R. 256:81-82. The man still had the towel on his head

and he had a backpack on his back. R. 256:82. The man on the bicycle then went across the circular driveway directly past Mr. Hartman's vehicle. R. 256:82. When the man went past his vehicle, Mr. Hartman made the decision to follow the man. R. 256:82. Mr. Hartman continued to follow the man on the bicycle for approximately 100 to 120 yards. R. 256:83.

6. As Mr. Hartman was following the man on the bicycle, the man turned his bicycle and acted as if he was going to shoot at Mr. Hartman's vehicle. R. 256:84. The man on the bicycle turned around and pointed at Mr. Hartman's vehicle like he had a gun. R. 256:96. In response, Mr. Hartman ran his vehicle into the back of the bicycle. R. 256:84. Upon impact, the man on the bicycle fell off of the bicycle and the towel fell off of the man's head. R. 256:85. The man then got up, picked up his bicycle and acted as if he was going to try to get back on it and run away. R. 256:85,86. The man then dropped the bicycle and took off on foot through a barn and some houses. R. 256:85,86. The whole time that Mr. Hartman followed the man on the bicycle, the man was holding the towel on his head. R. 256:101.

7. As the man was trying to figure out what to do about the bicycle, Mr. Hartman remained in his vehicle with his high beam lights on the man. R. 256:86. In addition, there was a street light overhead where the impact had occurred. R. 256:87-88. Mr. Hartman was able to see the man for a "matter of a few

seconds" at this time. R. 256:87. Mr. Hartman was focused on this man as his house had just been burglarized. R. 256:87. At this time, Mr. Hartman was about six or seven feet away from the man, the length of the hood of his vehicle. R. 256:88.

8. During Mr. Hartman's chase of the man, his children were in the back seat of the vehicle apparently on the floor. R. 256:88. Mr. Hartman testified that his children were not making any noises to distract Mr. Hartman. R. 256:89. Mr. Hartman was afraid, but his fear only caused him to focus more on the man. R. 256:89. Mr. Hartman has good vision and claimed that he was not tired at the time all of this was happening. R. 256:89. Mr. Hartman reported that he had not consumed any drugs or alcohol prior to this incident. R. 256:89.

9. Even though Mr. Hartman claims he had a good view of the man on the bicycle, Mr. Hartman did not remember the man's shoes or whether or not the man had gloves on his hands. R. 256:103.

10. When the police were later investigating the burglary, they found a backpack, a key ring with "Ron" on it, and a cellular telephone. R. 256:166,168,169. These items were found near where Mr. Hartman had hit the bicycle and in the vicinity of where the second man ran after being struck by Mr. Hartman's automobile. R. 256:166

The Co-Defendant

11. The man who exited Mr. Hartman's house first and took off to the north was Dustin Ward. R. 256:123-128. Mr. Ward and Mr. Shepherd had been friends for approximately 13 to 14 years. R. 256:109.

12. Mr. Ward was arrested for his involvement with the burglary later in the morning on June 24, 2002. R. 256:111. Following his arrest, Mr. Ward confessed to having burglarized Mr. Hartman's home. Mr. Ward also stated that Mr. Shepherd was the individual who had been with him in Mr. Hartman's home. R. 256:111.

13. On the day before the burglary, June 23, 2002, Mr. Ward had switched cars with one of his friends. R.256:112. Mr. Ward switched cars with his friend to assist his friend in evading a federal warrant. R. 256:137. Sometime after switching cars with his friend, Mr. Ward went to Mr. Shepherd's house to purchase drugs from Mr. Shepherd's sister. R.256:113. While Mr. Ward was visiting with Mr. Shepherd's sister, he noticed a backpack in her room. Mr. Ward believed that this was his backpack that Mr. Shepherd had said was lost. R. 256:113-114. Mr. Ward had left a backpack with a Playstation in it at Mr. Shepherd's house several months before. R. 256:113-114. Despite Mr. Ward's repeated requests, Mr. Shepherd never did return the Playstation. R. 256:114.

14. While at Mr. Shepherd's house, Mr. Ward testified that the two of them decided to go riding on their bicycles. R. 256:119. Mr. Ward testified that they decided to leave West Valley and drive up to the Park City/Midway area. R. 256:119. They left West Valley City around 6:00 p.m. and went to the Homestead Resort in Midway, where they parked the truck. R. 256:119-120. They arrived around 8:30 p.m. and got their bikes out of the truck and began riding. R. 256:121.

15. Mr. Ward testified that he and Mr. Shepherd came upon Mr. Hartman's house and they thought it was new construction as the driveway had just been poured and there was obvious new construction around it. R. 256:122-123. Mr. Ward testified that he and Mr. Shepherd walked around the house and that Mr. Ward checked the door, it was locked, so Mr. Ward then entered the house through a window. R. 256:123. Then Mr. Ward claims he opened the door from the inside and let Mr. Shepherd into the house. R. 256:123-124. Mr. Ward testified that he and Mr. Shepherd wandered around the house and eventually ended upstairs in a bedroom. Mr. Ward took a knife and a pair of binoculars from Mr. Hartman's house. R. 256:125. Mr. Ward testified that Mr. Shepherd took a small television and wanted to take a computer. R. 256:126. Mr. Ward testified that he left Mr. Shepherd in the bedroom and went back downstairs where he heard voices. R. 256:127-128. Mr. Ward testified that he whistled loudly to warn Mr.

Shepherd who was still upstairs. R. 256:128. Then Mr. Ward ran out of the house, and took off running and eventually spent the night in a home that was under construction some distance away from Mr. Hartman's home. R. 256:128.

16. Later that morning, Mr. Ward testified that he walked out of the home under construction where he had spent the night and was stopped by a police officer shortly thereafter. R. 256:128-129. Initially, Mr. Ward lied to the police officer. R. 256:136. Later, Mr. Ward confessed that he had burglarized Mr. Hartman's home. R. 256:130. While Mr. Ward was confessing, he told the police that his friend, Ron Shepherd was the person who had been with him that night. R. 256:130.

17. Mr. Ward received a deal from the Wasatch County Attorney's office in exchange for his testimony. R. 256:132-134.

18. The relationship between Mr. Ward and Mr. Shepherd had become strained to the point that they are no longer friends. R. 256:110. The friendship deteriorated prior to the burglary of the Hartman house over the Playstation mentioned above and one of Mr. Ward's ex-girlfriends who dated Mr. Shepherd. R. 256:138-139.

Photo Line-Up Procedure

19. Sergeant Jeff Winterton of the Wasatch County Sheriff's Office was called out of bed to respond to the burglary at 11:30 p.m. on June 23, 2002. R. 256:171. The following morning, Sergeant Winterton was called to the scene after Mr. Ward was

apprehended. R. 256:172. Sergeant Winterton spoke with Mr. Ward at the police station later that same afternoon. R. 256:173.

20. During Mr. Ward's interrogation by the police, Mr. Ward identified Mr. Shepherd as the individual who had been with him the night before at Mr. Hartman's house. R. 256:173. About a week or so after being told by Mr. Ward that Mr. Shepherd was the other burglar, Sergeant Winterton made contact with an agent of Adult Probation and Parole and was able to get a photograph of Mr. Shepherd. R.256:174.

21. Sergeant Winterton did not get a description of the second suspect from Mr. Hartman prior to calling Mr. Hartman to come in to make an identification. R. 256:173-175.

22. Deputy Winterton contacted Mr. Hartman and had him come to the police station to look at a photograph. R. 256:104. Mr. Hartman attended a photo line-up with Sergeant Jeff Winterton a week or so after the burglary. R. 256:90, 174-175.

23. Sergeant Winterton could not remember how many photos he showed Mr. Hartman. R. 256:175. However, he thought that he may have shown Mr. Hartman a photo of Dustin Ward and a photo of someone named JJ in addition to the photo of Mr. Shepherd. R. 256:175-176.

24. At the time that Sergeant Winterton showed Mr. Hartman the photo of Mr. Shepherd he did not utilize a photo array. Sergeant Winterton only showed Mr. Hartman the photo of Mr.

Shepherd. R. 256:176, 188-189; R. 123:53-55. Sergeant Winterton testified that Mr. Hartman's response to the one photo line-up was immediate and Mr. Hartman stated that he was 95 percent sure that the photo was of the man that Mr. Hartman had knocked off of the bicycle with his vehicle. R. 256:176.

25. Sergeant Winterton testified that the one photo line-up procedure he utilized with the photo of Mr. Shepherd was not the "normal procedure" for a photo line-up. R. 256:176. Sergeant Winterton testified that the reason he did not utilize the "normal procedure" was because Mr. Ward had given him the name of Mr. Shepherd. R. 256:178. Sergeant Winterton only wanted Mr. Winterton to confirm what he believed he already knew. R. 256:178.

26. Sergeant Winterton also testified that there is a good reason for utilizing the normal procedure for photo line-ups. R. 256:184. Sergeant Winterton further testified that the one photo line-up he utilized was not done properly and was not fair. R. 254:184-185. Sergeant Winterton admitted that he took short cuts with the photo identification in this case. R. 256:186. Finally, Sergeant Winterton admitted that the one photo line-up was not effective. R. 256:195.

27. Mr. Hartman recollected that he looked at some photographs in a book and then he was independently shown a photograph of Mr. Shepherd. R. 256:105-106.

Identifications During the Trial

28. Mr. Hartman identified the man who burglarized his house on the early morning of June 26, 2002 at the trial in this matter. He identified Mr. Shepherd as the man on the bicycle. R. 256:88. At trial, Mr. Hartman stated that Mr. Shepherd's hair was different. On the morning of the burglary, his hair had been short on the sides and long in the back. But, at the trial it was short. R. 256:89-90.

29. Mr. Hartman also identified Mr. Shepherd as the burglar at the preliminary hearing. R. 256:90-91, R. 22311.

Alibi Witnesses

30. At trial, three witnesses provided alibi testimony. The first, Jeremy Duckett, was a roommate and friend of Mr. Shepherd. R. 256:198. Mr. Duckett saw Mr. Shepherd in West Valley City, Utah, at the time the burglary was taking place in Midway, Utah. R. 256:199-200.

31. Ryan Scott Driffell also testified that he had contact with Mr. Shepherd in West Valley City, at the time the burglary was taking place in Midway, Utah. R. 256:209-210. Mr. Driffell spoke with Mr. Shepherd on the telephone on the night in question. R. 256:210.

31. Mr. Shepherd's mother, Connie Markus, also testified that Mr. Shepherd was in West Valley City on the night in question. R.256:218. Ms. Markus testified that Mr. Shepherd was

at her home for a barbeque. R. 256:218. Ms. Markus further testified that the only time that Mr. Shepherd was not at her home on that evening was when he left to get some beer. R. 256:219. Ms. Markus remembers that night because of the beautiful, full moon. R. 256:222-223.

32. Jennifer Duncan also testified that she was with Mr. Shepherd on the night and early morning of the burglary. R. 257:8-10. Ms. Duncan was Mr. Shepherd's girlfriend. R. 257:7. Ms. Duncan testified that she and Mr. Shepherd had gone to the Albertson's in West Valley City, Utah to purchase some beer on the evening in question. R. 257:10-11. Ms. Duncan had provided a receipt to Mr. Shepherd's attorney who in turn had produced it to the Wasatch County Attorney's office in connection with his Notice of Alibi. R. 257:22. The receipt provided by Ms. Duncan had significant issues with its authenticity. R. 257:39, 42-47.

SUMMARY OF ARGUMENT

The trial court committed error when it admitted and unreliable out of court identification of Mr. Shepherd. Mr. Shepherd's due process rights were violated when the trial court allowed witness testimony about Mr. Hartman's out of court identification of Mr. Shepherd as one of the suspects who burglarized his home. Under the totality of the circumstances, Mr. Hartman's identification was unreliable. Initially, Mr. Hartman's ability to observe the suspect at the time of the event

was limited. Mr. Hartman was only able to see the suspect's face for a matter of a few seconds. Mr. Hartman was angry about the burglary of his house and afraid because he believed that the suspect he was chasing had been pointing a gun at him endangering the lives of his children. While Mr. Hartman was chasing the suspect, his children were in his vehicle with him. Thus, Mr. Hartman's attention must have been diverted to protecting them.

More importantly, the procedure by which Mr. Hartman identified Mr. Shepherd as one of the burglars was highly suggestive. Mr. Hartman did not provide a description of the suspect prior to being called to look at a photograph. When Mr. Hartman did go to look at a photograph, he was only shown one photo, a photo of Mr. Shepherd. Mr. Hartman had no other choice than to pick the one photo that was shown to him.

In addition to the problems associated with the admission of unreliable eyewitness identification testimony, Mr. Shepherd's counsel failed to follow through with a request from the trial court to provide information concerning a requested eyewitness identification expert. By failing to comply with the trial court's request, Mr. Shepherd was precluded from utilizing an expert to testify about the problems associated with eyewitness identifications in general and specifically in this case.

ARGUMENT

I. BECAUSE THE EYEWITNESS IDENTIFICATION OF THE APPELLANT WAS THE PRODUCT OF A SUGGESTIVE AND IMPROPER PHOTO LINE-UP, THE TRIAL COURT COMMITTED ERROR WHEN IT ADMITTED UNRELIABLE EYEWITNESS TESTIMONY.

In this case, the conviction was primarily based upon an eyewitness identification that the Appellant maintains was unreliable and therefore inadmissible. Under both the Utah State Constitution and the United States Constitution unreliable eyewitness testimony is inadmissible. UTAH CONST. Art. I, §7; U.S. CONST. XIV amend. It is the state's burden to demonstrate the admissibility of eyewitness evidence. *State v. Ramirez*, 817 P.2d, 774, 778 (Utah 1993).

The United States Supreme Court has set forth the applicable test for determining whether an identification is reliable under the United States Constitution. "Under the federal constitution, the basic due process issue is whether the identification is sufficiently reliable to be admitted in evidence." *Ramirez*, 817 P.2d at 779 (citing *inter alia* *Neil v. Biggers*, 490 U.S. 188 (1972); *State v. Thamer*, 777 P.2d 432, 435 (Utah 1989)).

In *Biggers*, five factors were identified as important to the determination of the reliability of an eyewitness identification:

the opportunity of a witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Ramirez, 817 P.2d at 779. The longstanding *Biggers* test and consideration of its enumerated factors, requires the trial court to apply a "totality of the circumstances" test in determining whether an identification is reliable enough to be admissible. *Id.* at 779.

In Utah, the Courts have devised a test that addresses the weaknesses of the *Biggers* approach. In *State v. Ramirez*, 817 P.2d 774 (Utah 1991), the Utah Supreme Court created what has become Utah's benchmark for determining the due process reliability of eyewitness identification under article 1 section 7 of the Utah Constitution. The *Ramirez* Court held that the "ultimate question to be determined is whether, under the totality of the circumstances, the identification was reliable." *Id.* at 781. In order to complete this analysis, the Court set forth five factors identified previously:

- (1) [T]he opportunity of the witness to view the actor during the event;
- (2) the witness's degree of attention to the actor at the time of the event;
- (3) the witness's capacity to observe the event, including his or her physical and mental acuity;
- (4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and
- (5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly. This last area includes such factors as whether the event was an ordinary one in the mind of the observer during the time it was observed and whether the race of the actor was the same as the observer's.

Ramirez, 817 P.2d at 781 (quoting *State v. Long*, 721 P.2d 483,493

(Utah 1986) (footnote omitted)).

In *Ramirez*, 817 P.2d 774, a robbery took place at a pizza restaurant at approximately 1:00 a.m. As three individuals were leaving the restaurant, they were stopped by a man who was wearing a white scarf around his face. The assailant also had a metal pipe in his hand. *Id.* at 776. The assailant demanded that the individuals leaving the restaurant give him the bank bag. A scuffle took place, but eventually, the assailant escorted two of the individuals back into the restaurant. *Id.* The assailant also told another assailant, who had been crouched down next to the corner of the building, to kill those left outside if they should move again. *Id.* This second man also had a white scarf covering most of his face. This second man held the gun on the individual. Then both assailants fled the scene and the police were called. A short time later, a police officer stopped a pedestrian. Ultimately, this pedestrian was handcuffed to a nearby chain link fence. Another police officer brought the three victims from the restaurant to where the pedestrian was to see if he could be identified as one of the assailants.

The identification show up then took place with the three individuals who had been at the restaurant. The circumstances were as follows:

It was approximately one o'clock in the morning. *Ramirez*, a dark-complexioned Apache Indian, was handcuffed to a chain link fence. He was the only suspect present and was surrounded by police officers. The police turned the

headlights and spotlights from the police cars on Ramirez to provide enough light. The witnesses viewed Ramirez from the back seat of a police car. Of the three witnesses, only [one] could identify Ramirez as the masked man with the gun; the other two witnesses were unable to identify him as one of the robbers.

Ramirez, 817 P.2d at 777.

After reviewing all of the factors, the *Ramirez* court concluded that it was "an extremely close case" and allowed the out of court identifications and subsequent in court identifications to be admitted. *Id.* at 784. However, the *Ramirez* court noted that the "blatant suggestiveness" of the show up was troublesome. *Id.* at 884.

The strong underpinning of Mr. Shepherd's conviction was Mr. Hartman's out of court identification following a one photo line-up. This identification led to the arrest of Mr. Shepherd.¹ Mr. Shepherd maintains that the Court improperly found the identification by Mr. Hartman to be reliable. This unreliable out of court identification led to an addition unreliable identification in court.

¹ Mr. Hartman's identification coupled with the co-defendant's allegation that Mr. Shepherd was with him at the house were the basis for the original arrest. However, Mr. Ward's allegation was suspect given his disputes with Mr. Shepherd over a girlfriend, some missing property and Mr. Ward's plea agreement in exchange for his testimony against Mr. Shepherd.

A. Mr. Hartman's Identification Was Unreliable Under The Utah Constitution.

1. **Opportunity of the Witness to View the Actor During the Event.**

The first factor to be considered in determining the reliability of an eyewitness identification is the witness's opportunity to view the actor during the event. *Ramirez*, 817 P.2d at 782. In reviewing this factor, the "pertinent circumstances include the length of time the witness viewed the actor; the distance between the witness and the actor; whether the witness could view the actor's face; the lighting or lack of it; whether there were distracting noises or activity during the observation; and any other circumstances affecting the witness's opportunity to observe the actor." *Id.* (citing *State v. Long*, 721 P.2d at 494 n.8).

In the instant case, these circumstances weigh in favor of a finding that the out of court identification was unreliable and therefore a violation of Mr. Shepherd's right to due process of law. The trial court found that Mr. Hartman had a "clear, unobstructed view of the suspect's face, his headlights providing direct illumination." R. 134. Despite these findings, the evidence demonstrates that Mr. Hartman did not have a great opportunity to view the suspect. Mr. Hartman admitted that he only saw the suspect's face for a "matter of seconds". R. 256:87. Mr. Hartman's children were in the back seat of the vehicle on

the floor where Mr. Hartman had instructed them to be in order to avoid danger. R. 256:88. In addition, the suspect had been looking back and pointing something at Mr. Hartman. R. 256:84. There can be no question that these two things were a distraction. While, there may have been illumination, Mr. Hartman's opportunity to view the suspect was very brief and was under circumstances that were less than ideal. In *Ramirez*, the witnesses did not have the same level of distraction as the witness in this case.

2. Degree of Attention of Witness at Time of Event

With regard to this factor, the trial court found that "Mr. Hartman was aware that his home had just been burglarized. The other burglar had fled previously and was no longer a distraction to Mr. Hartman. The suspect having been violently knocked off his bicycle was non-threatening and apparently dazed." R. 134. While it is true that the first burglar had already fled the scene, this finding does not take into account the fact that Mr. Hartman believed that the suspect had a gun and had been pointing it at him. R.256:84. The fact that Mr. Hartman believed that the suspect had a gun would necessarily divert his attention away from the suspect to protecting himself and his children. Again, this factor weighs in favor of a finding of unreliability.

3. The Witness's Capacity to Observe the Actor During the Event.

With regard to this factor, the trial court found "no evidence that Mr. Hartman was impaired by any visual defects, fatigue, drugs, or alcohol." R. 134, 133. However, in analyzing this factor, the "relevant circumstances include whether the witness's capacity to observe was impaired by the stress or fright at the time of the observation, by personal motivations, biases, or prejudices, by uncorrected visual defects or by fatigue, injury, drugs, or alcohol." *Ramirez*, 817 P.2d at 783. While Mr. Hartman may not have been intoxicated, he was frightened by his impression that the suspect had a gun and had pointed at him and his children. R. 256:88-89 . Also, Mr. Hartman had just deplaned from a business trip, drove nearly an hour and arrived at his home around midnight. All of these things would tend to make a person fatigued to some extent.

4. Whether the Witness's Identification was made Spontaneously and Remained Consistent.

In the instant case, Mr. Hartman's identification of Mr. Shepherd as the suspect was consistent. Also, Mr. Hartman's identification when presented with a single photograph was spontaneous.

When considering the fourth factor, the

relevant circumstances include the length of time that passed between the witness's observation at the time of the event and the identification of defendant; the witness's mental capacity and state of mind at the time of

identification; the witness's exposure to opinions, descriptions, identifications, or other information from other sources; instances when the witness or other eyewitnesses to the event failed to identify defendant; instances when the witness or other eyewitnesses gave a description of the actor that is inconsistent with defendant; and the circumstances under which defendant was presented to the witness for identification.

Ramirez, 817 P.2d at 783.

In this case, the police did not even bother to get a description from Mr. Hartman prior to showing him a single photograph of a man who was fingered by a person who had reasons to wrongfully accuse Mr. Shepherd.

5. The Identification Was A Product Of Suggestion.

With regard to this consideration, the trial court entered several findings. R. 132. First, "[t]he photographic identification occurred within two days of the burglary." Second, only a single photograph was used." Third, "[t]he photograph was not an attempt to match a description provided by Mr. Hartman." Fourth, "Sergeant Winterton did not make any comments to Mr. Hartman indicating any belief that the photograph portrayed the same suspect seen by Mr. Hartman." Fifth, Mr. Hartman's identification of Defendant as the suspect was immediate." And, sixth, Mr. Hartman has not wavered in identifying the Defendant as the suspect." R. 132.

Even with the foregoing findings in mind, there is no question that the photo line-up in this case was extraordinarily suggestive. Sergeant Winterton never obtained a description of

the suspect from Mr. Hartman. R. Sergeant Winterton told Mr. Hartman to come and look at a photograph. R.256:195. Mr. Hartman does in fact look at one photograph and immediately states that the man in the photograph is the suspect. R. 256:176. Mr. Hartman had no choice when looking at Mr. Shepherd's photograph. This procedure is not the "normal procedure" and it is not "fair". R. 256:185. Given the critical nature of avoiding suggestibility during a line-up, this factor weighs in favor of a finding of unreliability.

Under the totality of the circumstances, Mr. Hartman's identification of Mr. Shepherd was unreliable and inadmissible under Utah law. As is evident from the facts adduced at trial, Mr. Hartman's identification of Mr. Shepherd as one of the burglar's of his home was critical to the State's case against Mr. Shepherd. Had the identification testimony not been admitted in this case, there was a reasonable possibility of a more favorable result for Mr. Shepherd. First, there would have been no witness identification. Thus, more credibility would lend to Mr. Shepherd's alibi witnesses. Moreover, the finger pointing of Mr. Ward would have been less credible.

B. Under The United States Constitution, Mr. Hartman's Identification Was Likewise Unreliable.

For the same reasons outlined above, the Mr. Hartman's identification is likewise unreliable under the United States Constitution.

II. BECAUSE MR. SHEPHERD'S TRIAL COUNSEL FAILED TO PROVIDE REQUESTED INFORMATION TO THE TRIAL COURT REGARDING HIS REQUEST FOR PERMISSION TO UTILIZE AN EYEWITNESS IDENTIFICATION EXPERT, HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

In considering whether a defendant was denied effective assistance of counsel contrary to the mandate of the Sixth Amendment of the United States Constitution, Utah courts follow the test enumerated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Court created a two-prong test for evaluating a claim for ineffective assistance of counsel. "To establish an ineffective assistance of counsel claim, defendant must show, first, that counsel rendered a deficient performance that fell below an objective standard of reasonable professional judgment, and second, that counsel's deficient performance prejudiced the defendant." *Salt Lake City v. Grotepas*, 874 P.2d 136, 138 (Utah App. 1994), *reversed*, 906 P.2d 800 (Utah 1995).

In the instant case, Mr. Shepherd maintains that his trial counsel prevented him from having effective assistance of counsel at trial in that he failed to provide the requested eyewitness expert information to the trial court. Specifically, Mr. Shepherd's trial counsel filed a motion seeking permission to utilize and funding for an eyewitness expert. R. 54-63. The State objected to the use of or having to pay for an eyewitness expert. R. 98-102. However, the trial court specifically ordered Mr.

Shepherd's counsel to provide the proposed expert's curriculum vitae and report setting forth his expected testimony so that the trial court could rule on Mr. Shepherd's request. R. 131. It was not reasonable for Mr. Shepherd's trial counsel not to follow through and provide the requested information to the trial court.

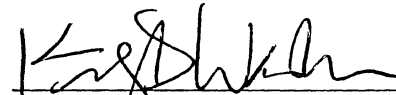
Second, Mr. Shepherd's trial counsel's failure to provide the requested information to the trial court prevented Mr. Shepherd from potentially having an eyewitness expert testify on his behalf at the trial. This is critical given the fact that Mr. Shepherd maintain his innocence following his arrest to the present date. Mr. Shepherd presented alibi witnesses and a plausible explanation for Mr. Ward's allegation that Mr. Shepherd was the other burglar. Nevertheless, this evidence was not sufficient to overcome Mr. Hartman's identification of Mr. Shepherd as one of the men who had burglarized his house. The eyewitness expert very likely may have made a difference with an explanation of the fallibility associated with eyewitness testimony.

Based on Mr. Shepherd's denial of effective assistance of counsel, he respectfully requests that this Court set aside his conviction and remand this matter for a new trial where he may utilize the testimony of an eyewitness identification expert.

CONCLUSION

Based upon the foregoing, the Appellant respectfully requests that the Court set aside his conviction and remand this matter to the trial court for a new trial.

DATED this 14th day of May, 2004.



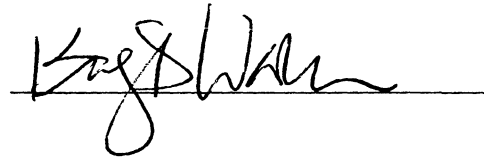
Kimberly D. Washburn
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing BRIEF OF APPELLANT were served, via first class mail, postage prepaid, upon the following:

Matthew Bates, Esq.
Assistant Attorney General
Utah Attorney General's Office
Appeals Division
160 East 200 South, Sixth Floor
Salt Lake City, Utah 84114-0854

DATED this 14th day of May, 2004.

A handwritten signature, appearing to read "Greg Walsh", is written over a horizontal line.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Appellee/Plaintiff,	:	ADDENDUM TO APPELLANT'S BRIEF
	:	
vs.	:	
	:	
RON DENNIS SHEPHERD,	:	Appeal Number 20030863CA
	:	
Appellant/Defendant.	:	

ON APPEAL FROM THE CONVICTION AND JUDGMENT ENTERED BY THE FOURTH
JUDICIAL DISTRICT COURT, WASATCH COUNTY, STATE OF UTAH
HONORABLE DONALD J. EYRE PRESIDING

Kimberly D. Washburn, No. 6681
LAW OFFICE OF KIMBERLY D. WASHBURN, P.C.
Attorney for Appellant
405 East 12450 South, Suite A
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Draper, Utah 84020
Telephone: (801) 571-2533

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FILED
UTAH APPELLATE COURTS
MAY 26 2004

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Constitutional Provisions

Utah Constitution, article 1, section 7

United States Constitution, Fifth Amendment

United States Constitution, Fourteenth Amendment, section 1

United States Constitution, Sixth Amendment

"Findings of Fact, Conclusions of Law, And Order Denying
Defendant's Motion To Suppress Eyewitness Identification"

Preliminary Hearing Transcript, page cited in Appellant's Brief

Trial Transcript, pages cited in the Appellant's Brief

Certificate of Service of Addendum to Appellant's Brief

Utah Constitution:

- In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UTAH CONST. art. 1, §7.

United States Constitution:

- No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

UNITED STATES CONST. Fifth Amendment

- All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

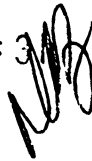
UNITED STATES CONST. Fourteenth Amendment, §1

- In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONST. Sixth Amendment

CLERK OF DISTRICT COURT
JANUARY 1997
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JANUARY 1997

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DEREK P. PULLAN #6633
Wasatch County Attorney
THOMAS L. LOW #6601
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805 West 100 South
Heber City, Utah 84032
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IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR WASATCH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. RON DENNIS SHEPHERD, Defendant.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EYEWITNESS IDENTIFICATION Case No. 021500129 Judge Donald J. Eyre
---	--

THE ABOVE-ENTITLED MATTER came before the Court on Defendant's motion to suppress the out-of-court and in-court identifications of the eyewitness, Mark Hartman. Defendant was present and represented by counsel, J. Bruce Savage. The State was represented by Thomas Low. Evidence was taken and arguments were heard. The Court now being fully advised in the premises, makes and enters the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. On June 24, 2002, Mark Hartman arrived at his home in Midway, Utah, with his two children, and discovered a man coming out of his house, who thereafter fled.
2. Mr. Hartman then left his children outside, entered his home, looked around, and came back outside after confirming that his home had been burglarized.
3. While Mr. Hartman was outside, a second intruder exited the home wearing a towel over his head to obscure his face. Mr. Hartman could not see the man's face through the towel.
4. The second intruder (hereinafter "the suspect") pointed something at Mr. Hartman, which Mr. Hartman thought might be a gun, though it was too dark to be sure. Mr. Hartman told his children to get back in the car, and Mr. Hartman backed up, still facing the suspect until he turned a corner and then quickly got into his car.
5. Mr. Hartman observed the suspect leaving his home on a bicycle. Mr. Hartman followed the suspect in his car, with his high-beams illuminating the suspect. The suspect, certainly in an attempt to dissuade Mr. Hartman from following him further, pointed something backwards toward Mr. Hartman's car. In response to this perceived threat, Mr. Hartman caused his vehicle to bump the suspect's bicycle, causing the suspect to fall from the bicycle and the towel he had

continued to wear to fall from his head.

6. After the suspect fell from the bicycle, he got up and tried to get back on the bicycle. Mr. Hartman, whose headlights were still set on high-beam, looked at and clearly saw the suspect's face. The suspect apparently discovered that his bicycle's rear wheel had been bent rendering the bicycle inoperable. Mr. Hartman was able to watch the suspect for several seconds as the suspect stood directly in front of the headlights, apparently trying to figure out what to do. During this process, the suspect also looked directly at Mr. Hartman for a few seconds. The suspect then fled on foot.
7. The following facts are pertinent in applying Ramirez's analysis to those moments after the suspect's towel fell from his head and stood in front of Mr. Hartman's vehicle:
 - a. Opportunity: Mr. Hartman had a clear, unobstructed view of the suspect's face, his headlights providing direct illumination.
 - b. Attention: Mr. Hartman was aware that his home had just been burglarized. The other burglar had fled previously and was no longer a distraction to Mr. Hartman. The suspect, having been violently knocked off his bicycle, was non-threatening and apparently dazed.
 - c. Capacity: There is no evidence that Mr. Hartman was impaired by any

visual defects, fatigue, drugs, or alcohol.

- d. Nature of the Event: Mr. Hartman was aware of the burglary of his home; and the suspect was a Caucasian, same as Mr. Hartman.
8. On June 26, 2002, Sergeant Jeff Winterton called Mr. Hartman and asked him to come to the Sheriff's Department to view a picture—essentially a photographic “show-up.” Sergeant Winterton had obtained a picture of Defendant because the co-defendant in this case, Dustin Ward, had confessed to his own involvement in the burglary and had also implicated Defendant.
9. When Mr. Hartman arrived at the Sheriff's Department, Sergeant Winterton showed him the picture of Defendant and asked him if that was the person that he had knocked off the bicycle two days previous. Mr. Hartman immediately responded that it was the same person, and clarified that he was ninety-five percent sure.
10. Subsequent to this photographic identification, Mr. Hartman had no other exposures to Defendant, whether in person or by photograph, until the Preliminary Hearing held nearly five months later, on November 13, 2002. At that time he again identified Defendant as the suspect he had knocked off a bicycle.
11. Concerning the method of identification employed by Sergeant Winterton, the following facts are relevant to the “Spontaneity and Consistency (Suggestibility)”

prong of the Ramirez analysis:

- a. The photographic identification occurred within two days of the burglary.
- b. Only a single photograph was used.
- c. The photograph was not an attempt to match a description provided by Mr. Hartman.
- d. Sergeant Winterton did not make any comments to Mr. Hartman indicating any belief that the photograph portrayed the same suspect seen by Mr. Hartman.
- e. Mr. Hartman's identification of Defendant as the suspect was immediate.
- f. Mr. Hartman has not wavered in identifying Defendant as the suspect.

BASED ON the foregoing Findings of Fact, the Court now makes and enters the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The Court must make a preliminary finding of threshold reliability before permitting the out-of-court and in-court identifications by Mr. Hartman to be admitted to a jury. It is the State's burden of proof. The standards for these threshold findings are set forth in State v. Ramirez, 817 P.2d 774 (Utah 1991), and its progeny.

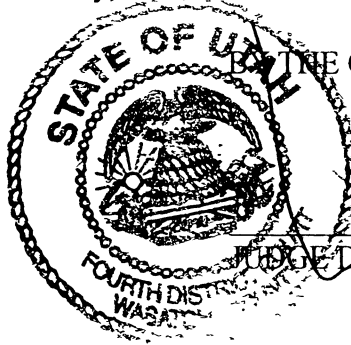
2. In examining the facts of the present case in light of those of Ramirez, the Court concludes that the comparison is favorable.
3. The procedure used was not optimal. Nevertheless, under the totality of the circumstances, the identifications are sufficiently reliable to be admitted as evidence at trial.

BASED ON the foregoing Findings of Fact and Conclusions of Law, the Court now makes and enters the following Order.

ORDER

1. Defendant's motion to suppress the out-of-court and in-court identifications by Mr. Hartman is denied.
2. As to Defendant's request for an expert witness, he is instructed to provide the Court, within ten days, the expert's curriculum vitae and report setting forth his expected testimony, whereupon the Court will rule on the request.

DATED this ^{20th} day of ^{June} ~~May~~, 2003.



THE COURT:

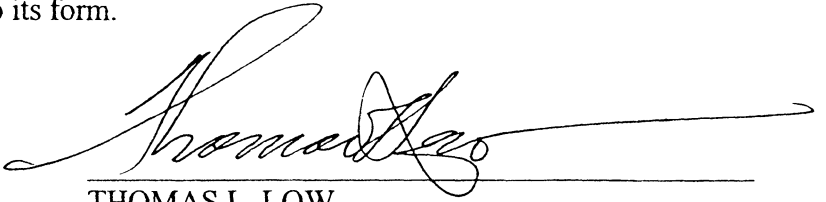
JUDGE DONALD J. EYRE

APPROVED AS TO FORM:

J. BRUCE SAVAGE, Attorney for Defendant

RULE 4-508 NOTICE

You are hereby notified that the above Findings, Conclusions, and Order will be submitted to the Court eight days from the date that it was mailed to you unless you notify counsel for the State that you object to its form.

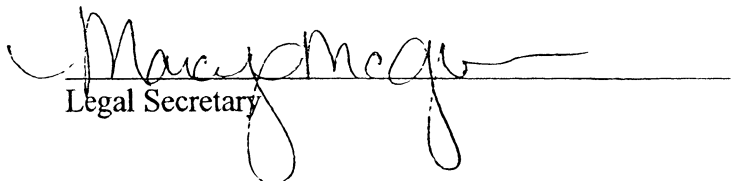


THOMAS L. LOW

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2003,
I caused to be mailed, by first class mail postage prepaid a true and correct copy of the foregoing
to:

J. BRUCE SAVAGE
1790 BONANZA B 223
P.O. BOX 2520
PARK CITY, UTAH 84060



Legal Secretary

IN THE FOURTH JUDICIAL DISTRICT COURT - HEBER COURT

WASATCH COUNTY, STATE OF UTAH

STATE OF UTAH, : Case No. 021500129FS
Plaintiff, :
v :
RON DENNIS SHEPHERD, :
Defendant. :

PRELIMINARY HEARING NOVEMBER 13, 2002

BEFORE

THE HONORABLE DONALD J. EYRE

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UTAH APPELLATE COURTS
MAR - 1 2004

20030863-CA

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 E. Ellen Way
Sandy, Utah 84092
801-523-1186

ORIGINAL

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1 A That is correct.

2 Q Okay. How did it come that you have identified Mr.

3 Shepherd? In other words, what procedures have occurred since

4 the evening in question that would cause you to know who this

5 individual is - other than today?

6 A Other than today. Just having seen him.

7 Q Today.

8 A Yes, from -

9 Q You've never seen any other pictures?

10 A I did see a picture of him.

11 Q Okay. And who presented that picture to you?

12 A That was Sergeant Winterton.

13 Q And when did that occur?

14 A It was probably within a couple of weeks after it

15 happened.

16 Q And was that presented to you, that picture by itself

17 or in an array of photographs?

18 A It was - there were other photographs, but I was

19 shown that one of him.

20 Q Okay, I'm not sure -

21 A I mean there were other - he had other pictures

22 besides just the defendant.

23 Q Okay. And did he give them to you and say we think

24 the suspect's one of these? Or did he say something like do

25 you see somebody you recognize? Or how did that happen?

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR WASATCH COUNTY, STATE OF UTAH

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Rme

STATE OF UTAH,

Plaintiff,

VS.

RON DENNIS SHEPHERD,

Defendant.

ORIGINAL

CASE NO. 021500129

JURY TRIAL

VOLUME 1

BEFORE THE HONORABLE DONALD J. EYRE, JR.

FOURTH DISTRICT COURT

125 NORTH 100 WEST

PROVO, UTAH 84601

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

JUNE 30, 2003

Reported by: Creed H. Barker, CSR, RPR, CRR

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UTAH APPELLATE COURTS

MAR -1 2004

20030863-CA

CERTIFIED TRANSCRIPT

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1 with the Court, and by giving the answers you did you are
2 ultimately the folks that have been selected.

3 You heard Mr. Low say a moment ago that
4 Mr. Shepherd's best friend did something. You're going to
5 hear testimony that in fact that's not the relationship of
6 this relationship at all. And you're going to hear and know
7 why that isn't the way they would like you to believe it.
8 They would like you to believe that they are those things.
9 You will hear evidence that is completely different.

10 You heard Mr. Low say that Mr. Shepherd did this,
11 Mr. Shepherd did that, he stole this, he stole that, he did
12 all of these things. Let me go back for just a second.

13 An opening statement such as this is really a road
14 map. And let me take on you that road map now and tell you
15 what all of this is going to mean in terms of where we're
16 going. This is the part we talked about, the opening
17 statement, where we all give you an outline of what is coming.
18 What I'm going to do is give you a better diagram of what's
19 coming from our side. You are going to hear from Mr. Hartman.
20 You're going to hear about someone, as Mr. Low said, who
21 brought himself back; which I think is a way to say he
22 regained his commonsense, and stopped chasing someone in the
23 dark and went back to protect his children. But then you'll
24 hear that this very man is driving all over, chasing somebody
25 with his children. So if in fact he's so afraid that there is

CERTIFIED COURT TRANSCRIPT

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1 a weapon, which by the way, you'll hear no testimony that
2 there is any weapon. Why would you, of course, take your
3 children, to wit, within range of a firearm? Think about that
4 as Mr. Low talks to you about commonsense. If I'm so afraid,
5 why would I take my children up close to you if I think or
6 know you have a gun? Problem number one.

7 Problem number two. You're going to hear about
8 Mr. Hartman picking somebody out. What you'll hear Mr.
9 Hartman talking about with this photograph, is Officer
10 Winterton and the procedure by which this presenting of a
11 photograph to Mr. Hartman is flawed. You're going to hear him
12 tell you that's not how he was trained to do it. You're going
13 to hear why he's trained to do it differently. And one of the
14 reasons is by doing it in error, it's unduly suggestive.
15 You'll hear all of that from the officer. Keep in mind Mr.
16 Hartman doesn't know Mr. Shepherd from an apple in the store,
17 never had any prior contact prior to these allegations. None
18 of any kind.

19 You're also going to hear from Mr. Ward, supposedly
20 Mr. Shepherd's best friend. Take a look at him, how he is
21 dressed and where he lives. What he didn't tell you is that
22 Mr. Ward is part of the deal, and you're going to hear about
23 the deal, the offensive nature of buying testimony. You'll
24 hear Mr. Ward tell you how many years he may not serve in
25 prison if he gets up there and tells you something. You'll

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1 hear there have been proceedings in this very courtroom, in
2 which the deal, the bought testimony is purchased, and you'll
3 hear how Mr. Ward, with at least two different attorneys, did
4 this very thing. When he comes in to tell you how true
5 something really is, ask yourself what Mr. Ward may or may not
6 be doing as it relates to how many years he may or may not be
7 in prison as a result of what he said.

8 You will also hear from Mr. Ward about his prior
9 felony criminal history. Operative word there, "felony." So
10 that when he was done here, part of the deal was not if he
11 goes to prison, because of what he was when he got here to
12 Wasatch County, but only for how long. Think about whether
13 you would trust an individual like that as you listen to his
14 testimony. He knew he was going to prison. He would come
15 out, but knew he's going. Think about that. Think about
16 whether or not the truthfulness of what he says is in some way
17 influenced by the fact of the deal you're going to hear about.

18 We stipulate that on June 23rd/24th, somewhere in
19 that midnight area, Mr. Hartman's home is burglarized.
20 There's no question about this. We stipulate that Mr. Ward
21 had something to do with it, because after all, they got him,
22 and he talked, and he said yes. We stipulate that there's
23 more than one person involved. You're going to hear testimony
24 about two people. You're going to see two bikes. This is not
25 the hard part. What the State wants you to do however, is

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1 take the testimony that says because there's two of them, it's
2 got to be him. And what we're going to tell you is, no, it
3 can't be him, and here is why. The State is on notice,
4 because we are obliged to tell them, of the witnesses we are
5 going to call. And that row of folks you saw at the back, who
6 are not in this room, are going to individually take the stand
7 and tell you where they were while all of this was going on.
8 Keep in mind, according to Mr. Low, they drive up on bicycles,
9 riding around doing mountain bike things, and somehow during
10 the night they're doing some bad things to Mr. Hartman's
11 house. You're going to hear about a barbecue party and people
12 who were at the party. You're going to hear about these
13 people who were talking to that man, face to face, in Salt
14 Lake County. You're going to hear from his prior landlord,
15 who on the day that we are talking about, runs into him at a
16 24 hour store, as in, "Oh, I know him. He used to live with
17 me. He paid me rent to live together. I know people in his
18 family." Not a passing shot, noting someone who walked by,
19 not someone in a panic who says, "I don't know, I've never
20 seen this guy before, and wrecking cars. He's going to talk
21 about some guy that has lived with him for years, who is going
22 to say to you from this stand, "This can't be, he was with me,
23 I saw him." And the "where" that he saw him, folks, is in
24 Magna. And for those of you who are geographically
25 challenged, like I am, that's a long ways from here in the

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1 THE COURT: Okay, you've been previously sworn.
2 Please take the witness stand.
3
4 MARK HARTMAN
5 Called by the State, having
6 Been previously sworn, testified as follows:
7
8 DIRECT EXAMINATION
9 BY MR. LOW:
10 Q. State your name and spell your last name.
11 A. Mark Hartman, H-A-R-T-M-A-N.
12 Q. What city do you reside?
13 A. Midway, Utah.
14 Q. For whom do you work?
15 A. I work for a company called Market Fair Foods.
16 Q. Do you remember the events of June 23rd, June 24th,
17 2002?
18 A. I do.
19 Q. And you've testified before regarding those events,
20 have you not?
21 A. I have.
22 Q. If I could show you what's marked as State's Exhibit
23 Number 1 --
24 MR. SAVAGE: I have seen that, Your Honor.
25 THE COURT: Okay.

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1 MR. LOW: And Your Honor, I think you have previously
2 indicated you'll be okay with dousing the lights momentarily?
3 THE COURT: Yes.
4 Q. (BY MR. LOW) Do you recognize that?
5 A. Yes, I do.
6 Q. What is it?
7 A. That's my home.
8 Q. And you can't quite read the address on the mailbox?
9 A. 472 west Meadowcreek Lane, Midway.
10 Q. Back in June of last year, what is going on with your
11 house?
12 A. After purchasing the home, I completely remodeled the
13 property.
14 Q. Is it being remodeled in June of last year?
15 A. It was.
16 Q. Now, the days immediately previous to June 23rd,
17 where were you?
18 A. I was just out of town on business, and I had just
19 returned that Sunday evening at the airport.
20 Q. How long had you been out of town?
21 A. I had been gone for 10 days.
22 Q. What was going to be happening on your house while
23 you were gone, if anything?
24 A. They were going to continue to do the remodel.
25 Actually the flooring was in the process of being done,

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1 putting the tile in and getting ready for the carpet to go in.
2 Q. Well, first, upon arriving back in Wasatch County in
3 this area, where did you go first?
4 A. Actually I called my children from the airport, to
5 let my two oldest children know I was back. And we were
6 looking forward to spending the night there.
7 Q. What city do they live in?
8 A. Their mother lives in Midway.
9 Q. So, close by?
10 A. Yeah.
11 Q. What time did you pick them up? Do you remember?
12 A. It would have been just shortly after midnight,
13 12:05, 12:10.
14 Q. So we are now Monday morning?
15 A. That's right.
16 Q. When time did you arrive?
17 A. We got to the house about 20 after, 25 after.
18 Q. Midnight?
19 A. After midnight.
20 Q. Here on State's Exhibit 1, that's projected up
21 there -- actually let's talk about this. This picture was
22 taken recently; is that correct?
23 A. That's correct.
24 Q. Back then how did the house look?
25 A. Actually the -- well, it looked pretty much the same

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1 from the outside. There was just still a lot of remodeling
2 going on outside.
3 Q. How about the driveway?
4 A. The driveway was in place.
5 Q. How long had it been in place on June 23rd?
6 A. It had not been that long.
7 Q. Were you still blocking that off?
8 A. It was actually still blocked off. They had not
9 taken off -- allowed us to be on it yet.
10 Q. If you could just come down to the projector here for
11 a minute. I'll give you a purple marker. Is this picture a
12 good picture to show basically where you parked that night?
13 Or is it not --
14 A. It's far over to the right.
15 Q. Is it visible on here?
16 A. Yes, it is.
17 Q. Would you go ahead and mark it with that marker.
18 So the purple mark would be where you parked your car?
19 A. Yes.
20 Q. To get there, did you drive on the driveway or up on
21 the dirt field?
22 A. Up on the dirt field.
23 Q. Were your two children with you?
24 A. Yes.
25 Q. What are their names?

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1 A. Shannon and Lane.
2 Q. What were their ages?
3 A. 14 and 15.
4 Q. Shannon was the older one?
5 A. Yes.
6 Q. After you parked the car, where did the three of you
7 proceed?
8 A. We walked across the driveway, and we went up the
9 sidewalk and onto the front porch.
10 Q. If you could just draw with that purple marker your
11 path.
12 Is there a front door right there?
13 A. There is.
14 Q. Did you go in the front door?
15 A. We did not.
16 Q. Why not?
17 A. We were just walking around the outside to see the
18 new windows and the exterior, what work had been done during
19 the time I had been gone.
20 Q. Stay right there. Let me show you what's marked as
21 State's Exhibit Number 2, also of the house.
22 MR. SAVAGE: I've also seen that.
23 Q. (BY MR. LOW) Just to orient the jury here, where is the
24 front door on this picture?
25 A. The front door is to the right.

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1 Q. And your car would have been parked also there to the
2 right?
3 A. That's correct, just off the driveway.
4 Q. If you could continue with the purple marker then to
5 mark your path where you proceeded then, after going to the
6 front door.
7 It looks like it's kind of a wrap around porch there?
8 A. It is.
9 Q. Upon arriving to the backside of the house there, did
10 you notice anything?
11 A. As we rounded the corner all of a sudden an
12 individual ran out the back door of the house.
13 Q. State's Exhibit Number 3, now the backside of the
14 house, can you put a purple mark where you were standing when
15 you saw this individual coming out of the back door of the
16 house.
17 That triple "X" there?
18 A. Yes.
19 Q. I can see three back doors here. Which are you
20 referring to?
21 A. The center back door, underneath --
22 Q. Go ahead and point to it on the projector screen.
23 A. Right here.
24 Q. Go ahead and take your seat.
25 You saw the individual come out of the back door of the

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1 house. Did you see what he was wearing? What did he look
2 like to you?
3 A. Just had shorts on, T-shirt, and a backpack.
4 Q. Did he have towels draped over his head?
5 A. He did not.
6 Q. At that point did you notice whether there were any
7 bikes parked at the backside of your house?
8 A. I did not at this time.
9 Q. Where did this man go?
10 A. He ran directly north from my property through two
11 houses under construction.
12 Q. Which direction is north on this picture?
13 A. It would be facing this way (indicating), going away
14 from the house.
15 Q. Whoever is taking this picture is standing to the
16 north of the house?
17 A. That's correct.
18 Q. So he came running that way, kind of running behind
19 this here. What did you do?
20 A. I proceeded to jump off the porch and chase after the
21 individual.
22 Q. How far did you get?
23 A. Almost to Kerry Lane, and then I lost sight of him.
24 I don't know where he went to.
25 Q. So the two houses are being constructed behind you

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1 there?
2 A. That's correct.
3 Q. After you lost sight of him, where did you go?
4 A. I went right back to the house. And the children
5 were still on the Porch.
6 Q. They had not gone in yet.
7 A. They had not.
8 Q. Did you decide to go in?
9 A. I did.
10 Q. Where did you go once you went inside the home?
11 A. The children and I entered the back door, and we
12 noticed that our refrigerator, that was sitting in the living
13 room because they were doing the flooring, both of the doors
14 were wide open on the refrigerator, and there was a gallon of
15 milk sitting on the refrigerator.
16 Q. Was that the way you left it when you left home?
17 A. It was not.
18 Q. So that was the first thing you noticed?
19 A. That was.
20 Q. Was the refrigerator by the back door?
21 A. Right by the door.
22 Q. Did you enter that same door the burglar had exited
23 out of?
24 A. Yes.
25 Q. Well, after that, where did you go?

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1 A. I said, "Let's go upstairs and see what's going on
2 here."
3 Q. What did you see?
4 A. We got to the top of the stairs and I saw my CPU
5 computer sitting in the hallway.
6 Q. Was that where you left it before you went on your
7 trip?
8 A. It was not.
9 Q. Where was it?
10 A. In my bedroom.
11 Q. Was it connected to your monitor?
12 A. It was.
13 Q. Was it in a desk?
14 A. It's actually in a computer credenza.
15 Q. Well, you noticed that in the hallway. Then where
16 did you proceed?
17 A. We went into my bedroom.
18 Q. What did you see in the bedroom?
19 A. All of the drawers had been emptied, and all of the
20 clothes in the closet had been pulled to the floor. And there
21 was half a gallon of ice cream that was sitting on my chest of
22 drawers with a spoon in it.
23 Q. Again, is that the way you had left the home?
24 A. That is not.
25 Q. After noticing that your drawers and closets and

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1 whatever had been emptied out, the ice cream there and
2 refrigerator the way it was, what did you decide to do?
3 A. I told the kids, "Let's go back outside. I'm going
4 to call the police."
5 Q. Did you have a phone to call the police?
6 A. I had my cell phone with me.
7 Q. Did you proceed outside.
8 A. We did out the back door, walked on across the porch
9 and down to where the garage was.
10 Q. So over closer to the side?
11 A. That's correct.
12 Q. So what did you do; call the police?
13 A. I called 911.
14 Q. Did you talk to anybody?
15 A. Dispatch.
16 Q. While you're talking to dispatch what happens?
17 A. Actually as I was ending the call, another individual
18 came out of the house.
19 Q. Had you seen this individual while inside the house?
20 A. We did not.
21 Q. When he came outside, what was he wearing?
22 A. Actually wearing shorts and a T-shirt.
23 Q. Again, at this point had you noticed any bicycles by
24 where you were standing?
25 A. No.

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1 Q. Even though by this point you were pretty close to
2 where they were near?
3 A. Yeah. They were leaning up against the garage, but I
4 still hadn't noticed them at this point.
5 Q. Besides the shorts and shirt, what else did this
6 individual have on?
7 A. One of my hand towels over his head.
8 Q. How was it over his head, describe that?
9 A. It was draped over the top of his head, and he was
10 holding it here at the bottom, kind of like --
11 Q. Like a bonnet or something?
12 A. Like a type of bonnet.
13 Q. With the towel draped over that way, could you see
14 his face?
15 A. Not really.
16 Q. Was there much of any lighting in the back of your
17 house?
18 A. No, it was dark.
19 Q. Did he or you say anything when he came out of the
20 house?
21 A. When he came out of the porch I kind of yelled an
22 audible at him, not specifically saying anything, just, "Hey,"
23 like that. And he yelled back.
24 Q. Well, so you don't remember what you said and what he
25 said?

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1 A. Yeah.
2 Q. Just some sort of yelling?
3 A. Yeah.
4 Q. Did he do anything else?
5 A. He made a gesture with his arm as though he was
6 carrying a weapon.
7 Q. Could you show the jury what gesture it was?
8 A. He was going like this to me (demonstrating), and he
9 kept moving back and forth like this (demonstrating).
10 Q. Could you see what he was holding, if anything?
11 A. I could not tell.
12 Q. Did you become aware later on officers had found a
13 bottle or can of mace?
14 A. I was aware of that later, yes.
15 Q. Did it look like a can of mace? Or did it look
16 different to you?
17 A. It was dark and I could not tell.
18 Q. When he started pointing at you with your thumb and
19 finger extended like a gun, that's the way you thought it
20 looked?
21 A. Yes.
22 Q. What did you do?
23 A. I immediately told my two children to slowly back up
24 and head for the car, as far as they could.
25 Q. Did they back up the same way you had come in, all

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1 the way around the house?

2 A. No, they didn't. They exited around the back of the

3 garage.

4 Q. So the short way?

5 A. Yes.

6 Q. Well, you're just a few feet from the garage then?

7 A. Yeah.

8 Q. Told them to go to the car. Then what did you do?

9 A. I was very careful to back up while watching the

10 defendant, because I was afraid I was going to get shot, so I

11 kept backing up very, very slowly until I could get to the

12 edge of the garage.

13 Q. When you got to the edge of the garage were you able

14 to get out of his sight?

15 A. Once I was out of his sight I dashed for the car.

16 Q. Did you get in the car?

17 A. I did.

18 Q. Once you got in the car what did you do?

19 A. The children had jumped into the backseat, and I was

20 sitting in the front and I was getting ready to exit the

21 house.

22 Q. You mean to drive off?

23 A. Yeah. I was thinking that maybe I should just drive

24 off.

25 Q. While you were contemplating that force of action,

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1 did something happen to cause you to change your mind?

2 A. Yes. The individual came around the house on a

3 bicycle.

4 Q. Was the towel still over his head at that point?

5 A. Yes.

6 Q. Do you remember what kind of bicycle it was?

7 A. Just -- I just at that point knew it was a bicycle.

8 Q. When he came around the corner of the house on a

9 bicycle, was he carrying a backpack or anything like that?

10 A. He was wearing a backpack.

11 Q. So he had a towel on his head and wearing a backpack?

12 A. That's right.

13 Q. Where did he go?

14 A. He actually went out on the circular drive and went

15 on, onto the street.

16 Q. So did he go behind you then?

17 A. He went directly past us and out around the circle.

18 Q. So he passed right in front of your car?

19 A. That's correct.

20 Q. After he passed you in front of your car and passed

21 you out in front of the street, what did you decide to do?

22 A. I decided at that point to follow the defendant.

23 Q. And where did the two of you go?

24 A. The defendant proceeded down the street, away from my

25 home. And I followed him in my vehicle.

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1 Q. If I could show -- could you come down and show the

2 jury what you meant by -- let's use a different marker -- by

3 the defendant's path on the bicycle.

4 Okay, that it is, that's in orange there?

5 A. Yes.

6 Q. Went around that circle there and came out?

7 A. Yes.

8 Q. You were still parked there?

9 A. Yes.

10 Q. So he drove across the concrete?

11 A. That's correct.

12 Q. Did you drive across the concrete?

13 A. I did not.

14 Q. You backed up?

15 A. I backed up and came out.

16 Q. Where did you go?

17 A. I followed him down the street.

18 Q. How far did you proceed down the street?

19 A. There are two other houses on that side of the street

20 as I was heading down. I don't know what the distance is;

21 maybe 100 yards, 120 yards.

22 Q. If I could show you what's been marked as State's

23 Exhibit Number -- let's mark it number 4. What does that

24 represent?

25 A. That is the other house that's the last house on the

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1 street where I live. And as I approached him, that's actually

2 where I hit the defendant's bike.

3 Q. One thing we don't have is a picture showing how far

4 this is from your house. So how far, say this light post, how

5 far is that from your house?

6 A. Maybe 150 yards.

7 Q. So just a couple houses away really?

8 A. Yeah.

9 Q. Could you tell the jury what happened when you got to

10 this vicinity right there.

11 A. As I approached the defendant, as I was right behind

12 him, I was hoping that the sheriff's department was going to

13 arrive soon. But I was following him, and as I got a little

14 bit close to him, the defendant, again, turned on his bike,

15 and acted as though he was going to shoot at my windshield.

16 Q. Could you show the defendant's path on there, just

17 draw it on there again.

18 Go ahead and take your seat for a minute.

19 Once you arrived to that location where the orange marker

20 stops, what happens?

21 A. The defendant had, again, reached back as though he

22 was going to shoot at my windshield. At that point in time I

23 had each, previously, told the kids to get on the backseat of

24 the car on the floor. When he made that motion to me, I took

25 my car and hit the back of the bicycle.

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1 Q. At some point after that did you get a look at the
2 bicycle?
3 A. Yes, I did. It was left by the defendant.
4 Q. This red bicycle here, is this the bicycle you hit
5 with the car?
6 A. Yes.
7 Q. And this rear tire that's crinkled like that, did you
8 dod that?
9 A. I did.
10 Q. When you hit the back of the bicycle, what happened
11 to the defendant?
12 A. The defendant fell off the bike.
13 Q. What happened to the towel on his head?
14 A. The towel on his head came off.
15 Q. I want to turn this off. One more question before we
16 can. After you knocked him off and the towel comes off his
17 head, where does he go?
18 A. First he stands up and tries to pick up his bike,
19 like he was going to ride away.
20 Q. I'll go on to that. Eventually he runs off?
21 A. Yeah, he runs between the house and the barn you see
22 there on the left.
23 Q. If you could come mark that, and then I'll turn it
24 off. The fan is kind of loud. I want to make sure we can
25 hear each other. Thank you.

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1 Behind those two houses what is there. I see a big tree?
2 A. It's just trees, and fields and a creek all the way
3 down through there also.
4 Q. Okay, thank you.
5 Now let's go back to when you knocked him off the bicycle.
6 A. Okay.
7 Q. First thing you said, the towel fell off his head?
8 A. That's correct.
9 Q. Then what happened? What did he do next?
10 A. The defendant stood up and tried to pick up his
11 bicycle as though he was going to ride away on it.
12 Q. Did he in fact get up on it and ride away on it?
13 A. No, he noticed that the back tire was not functional
14 any longer.
15 Q. Then what did he do?
16 A. He dropped the bike, and that's when he ran off
17 between the house and the barn.
18 Q. What was your view of the defendant, or of this
19 burglar like during that period of time when he's looking at
20 the bicycle and figuring out what to do?
21 A. Actually I had the high beams on on my vehicle.
22 After I hit the individual, when he went to stand up, I had a
23 very, very good view of him standing right in front of me,
24 right in front of my car. It was like as though he were a
25 deer in the headlights, and he was dazed also. I didn't know

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1 what was going to happen next --
2 MR. SAVAGE: Object to the nature of the answer. It
3 was not responsive. If we could return to question and
4 answer, I think it will be more helpful.
5 THE COURT: Listen closely to the question and just
6 answer the question.
7 Q. (BY MR. LOW) You indicated he tried to get back on the
8 bicycle, and you were describing your view of him. When you
9 said he was like a deer in the headlights, what was he doing?
10 A. Just standing looking at me.
11 Q. How long did that last?
12 A. Matter of a few seconds.
13 Q. When he was standing there looking at you, is he
14 pointing anything at you?
15 A. At that particular time he was not.
16 Q. Were you looking at him?
17 A. I was.
18 Q. Now, you were aware that your house had just been
19 burglarized?
20 A. That's correct.
21 Q. Was your attention focused on this man?
22 A. It was.
23 Q. In addition to your high beams, we noticed there was
24 a street lamp on that street right where this occurred.
25 A. That's correct.

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1 Q. Was that light on?
2 A. It was.
3 Q. How far would you say you were from this man while
4 you were looking at him?
5 A. I would say 6, 7 feet.
6 Q. Just the length of the hood of the car?
7 A. Yes.
8 Q. And then a foot or two or three more?
9 A. That's correct.
10 Q. Do you see the individual that you hit off the
11 bicycle in the courtroom today?
12 A. Yes, I do.
13 Q. Can you identify him for the Court?
14 A. Yes, he's sitting here at the table.
15 MR. LOW: May the record reflect that, Your Honor --
16 THE COURT: The record may reflect he's pointed out
17 the defendant, Mr. Shepherd.
18 Q. (BY MR. LOW) Other than the towel that was now gone, did
19 Mr. Shepherd have any other disguise on his face?
20 A. He did not.
21 Q. What were your children doing while you were looking
22 at Mr. Shepherd?
23 A. They were actually on the floor of the backseat of
24 the car.
25 Q. Were they making any noises that distracted you?

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1 A. They were not.
2 Q. Well, were you scared? How were you feeling at the
3 time?
4 A. Umm, yeah, I guess I was scared over the situation.
5 Q. Did that fright or fear, whatever you did feel there,
6 did that impair your ability to concentrate on this
7 individual's face, Mr. Shepherd's face?
8 A. No. I would say it probably focused me more.
9 Q. Do you require any glasses or corrective vision?
10 A. I do not.
11 Q. How tired were you at the time?
12 A. Oh, I had slept quite a bit on the airplane, so I was
13 not really tired. I'm more of a night person.
14 Q. Had you been injured in any way that day?
15 A. I had not.
16 Q. Had you consumed any drugs or alcohol that day?
17 A. I had not.
18 Q. Does Mr. Shepherd look the same now as he did that
19 night?
20 A. The only thing that I notice now that's a little
21 different, his hair was longer in the back.
22 Q. How about on the front or sides?
23 A. It was shaved pretty -- real close, but it was longer
24 in the back.
25 Q. Do you remember how it was in the back, if it was

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1 done up or just let down?
2 A. I don't.
3 Q. Do you remember how long it was in the back?
4 A. No. I would say like maybe 4 inches maybe, hanging
5 in the back.
6 Q. Well, but the sides. He has it short now. Was it
7 short then?
8 A. It was short then, yes.
9 Q. Let's talk about something else for a second. If you
10 could just tell the jury, since that night what other
11 exposures you have had to Mr. Shepherd. You saw him that
12 night on the bicycle. After that night have you seen him or a
13 picture of him since then?
14 A. I did see a picture of him.
15 Q. Which was that?
16 A. A couple days after the incident.
17 Q. Who showed that picture to you?
18 A. Detective Winterton.
19 Q. After that?
20 A. Was, I guess -- I'm not sure what you call the
21 initial hearing. He was here then. I saw him then.
22 Q. Was it another hearing at which you testified?
23 A. Yes, it was.
24 Q. Perhaps a preliminary hearing?
25 A. That's correct.

CERTIFIED COURT TRANSCRIPT

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1 Q. Do you remember if that was in November of last year?
2 A. Yes, it was.
3 MR. LOW: May the court take judicial notice that the
4 preliminary hearing was taken last year in November?
5 MR. SAVAGE: I don't object to the judicial notice,
6 but I object to the leading nature of the question.
7 THE COURT: I'll check and see when the hearing was.
8 MR. LOW: November 13th, 2002.
9 THE COURT: The Court will take judicial notice and
10 indicate to the jury that the preliminary hearing was held
11 November 13th, 2002.
12 Q. (BY MR. LOW) Between the time you saw a photograph of
13 Mr. Shepherd until the preliminary hearing, did you have any
14 other exposure?
15 A. I did not.
16 Q. From the date of the preliminary hearing,
17 November 13th of 2002, until today's date have you seen Mr.
18 Shepherd or a picture of Mr. Shepherd?
19 A. I did not.
20 Q. When you testify now that Mr. Shepherd was the
21 individual you knocked off the bike, what are you remembering
22 in your mind, the picture, the preliminary hearing, that
23 night, what are you referring to?
24 A. Actually I remember from having him stand directly in
25 front of my vehicle and looking at him.

CERTIFIED COURT TRANSCRIPT

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1 Q. Do you remember the picture you were shown of him by
2 Sergeant Winterton?
3 A. Yes.
4 Q. Could you describe it for the jury?
5 A. Yeah. It had him with the short hair and like the
6 square face, square forehead.
7 Q. Could you see a ponytail on the back of that picture
8 Sergeant Winterton showed you?
9 A. No.
10 Q. At the preliminary hearing did he have a ponytail or
11 long hair in the back?
12 A. I don't remember.
13 Q. Today, how sure are you that Mr. Shepherd is the
14 individual that you knocked off the bicycle?
15 A. He is the one that I knocked off the bicycle.
16 MR. LOW: Your Honor, I'll move to admit the pictures
17 1 through 4.
18 THE COURT: Any objection?
19 MR. SAVAGE: No, none at all.
20 THE COURT: They're received.
21 (State's Exhibit Nos. 1 through 4
22 Were received into evidence.)
23 Q. (BY MR. LOW) I'll show you State's Exhibit Number 5. Do
24 you recognize that?
25 A. Yes, I do.

CERTIFIED COURT TRANSCRIPT

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1 Q. What is it?
2 A. A hand held television that I purchased for my son
3 the previous Christmas.
4 Q. Previous Christmas of 2002?
5 A. Yes.
6 Q. How much did you pay for that?
7 A. Like \$90.
8 Q. Where was it kept in your house?
9 A. Actually it was in my bedroom, in my chest of
10 drawers.
11 Q. Where was your computer in relationship to that
12 television?
13 A. It was in my bedroom.
14 Q. Same piece of furniture, or a different piece of
15 furniture?
16 A. Different piece of furniture.
17 Q. Did you give this TV to anybody?
18 A. I did not.
19 Q. Did you give Mr. Shepherd permission to possess that?
20 A. I did not.
21 MR. LOW: Move admission of State's Exhibit 5.
22 THE COURT: Any objection?
23 MR. SAVAGE: No objection.
24 THE COURT: It's received.
25 (State's Exhibit No. 5)

CERTIFIED COURT TRANSCRIPT

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1 Was received into evidence.)
2 Q. (BY MR. LOW) And then again, you've already testified
3 regarding the computer. It had been moved?
4 A. That's correct.
5 Q. That was not the way you left it?
6 A. It was not.
7 Q. Did you give Mr. Shepherd or anybody else permission
8 to move that computer or take that computer?
9 A. I did not.
10 MR. LOW: Nothing further of this witness.
11 THE COURT: Mr. Savage, cross-examination.
12 MR. SAVAGE: Thank you.
13
14 CROSS-EXAMINATION
15 BY MR. SAVAGE:
16 Q. I'm going to ask you questions from here.
17 As I understand your testimony, you arrived sometime after
18 midnight, which would put us into June 24th?
19 A. That's correct.
20 Q. And you'd flown in from -- I don't believe you told
21 us where you had been.
22 A. I don't remember exactly where I had been previous.
23 Q. Okay. And at that point then you came around the
24 porch and see an individual come out the back door and run.
25 My understanding of your testimony here, and prior hearings,

CERTIFIED COURT TRANSCRIPT

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1 is that this person had on a T-shirt and shorts, same as
2 you've testified today?
3 A. That is correct.
4 Q. Could you tell us about the colors?
5 A. Actually the individual who went off the back porch,
6 it was dark. I do not remember the color.
7 Q. And given the fact there's not a lot of lighting in
8 there, you didn't really have a chance to see, even if there
9 had been a color, you wouldn't be able to tell the difference
10 between say blue or green?
11 A. I did not know the color.
12 Q. Was it a darker color or a lighter color?
13 A. I really did not know the color.
14 Q. And that's the individual that you chased out to
15 Kerry Lane; is that correct?
16 A. That's correct.
17 Q. Now, at that point, I assume thereafter you go to
18 make the 911 call, which makes sense. Another individual
19 comes out. Are you in a place there to see colors that you
20 wouldn't have seen from the first incident?
21 A. No.
22 Q. How close is it to where we are at this moment the
23 second individual comes out? How close are we in terms of the
24 threats that you used with your hands a little earlier in
25 terms of time?

CERTIFIED COURT TRANSCRIPT

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1 A. I would say from here to the gentlemen that's seated
2 over there.
3 Q. So that's physical distance about how far he was?
4 A. Yes.
5 Q. And with this is towel on his head, you can't see the
6 face?
7 A. That's correct.
8 Q. When you gesture for the record, "can't see this,"
9 the typist record can't see it. You've placed one hand in the
10 other and pointed like that (demonstrating), kind of like a
11 Miami Vice thing, sort of thing, some sort of combat pose. Is
12 what I'm doing now a fair representation of what you did?
13 A. Yeah, it was like this (demonstrating).
14 Q. Was he pointing that at you?
15 A. He was.
16 Q. Was his arm out in front?
17 A. It was.
18 Q. Later you talk about somebody on a bicycle going like
19 that?
20 A. Yes.
21 Q. But from the time this happened, for good reason
22 caused you to be afraid, this individual is about as far as
23 that officer, maybe as far as I am?
24 A. That's correct.
25 Q. Pointing at you, right at you like this, and the

CERTIFIED COURT TRANSCRIPT

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1 other arm like that; is that right?

2 A. At least with the one arm out like that.

3 Q. Something like this (demonstrating)?

4 A. Yes.

5 Q. And pointing directly towards you?

6 A. That's correct.

7 Q. Do you have a good view of my voice where I sit?

8 A. I do.

9 Q. And you can see. Was this about what it was on that

10 night?

11 A. Maybe just a little further.

12 Q. At that point, having realized now there are two

13 people, and seeing this person doing this (demonstrating), can

14 you tell us whether you can see anything in this person's

15 hands?

16 A. I could not tell if they had anything in their hand

17 or not.

18 Q. So without seeing that, you're presuming that there

19 was a weapon in his hand; isn't that correct?

20 A. That is correct.

21 Q. And you've already testified that you have

22 subsequently learned in fact there was a can of mace somewhere

23 in this episode; isn't that true?

24 A. That's correct.

25 Q. Isn't it just as likely what the person was doing was

CERTIFIED COURT TRANSCRIPT

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1 standing like this with a can of mace?

2 A. It could be.

3 Q. You didn't see the barrel of a gun is my point,

4 correct?

5 A. That's correct.

6 Q. So you saw an outstretched arm or hand. You can't

7 tell me sitting from where I am to you what is in this

8 person's hand at that time; is that correct?

9 A. That is correct.

10 Q. But you presumed it was a gun?

11 A. That is correct.

12 Q. And you went into what would be a normal response,

13 thinking someone is pointing a gun at you, told your children

14 to run away?

15 A. That's correct.

16 Q. Go to safety, get away from this person; is that

17 right?

18 A. That is correct.

19 Q. You said you had called your children -- I'm

20 digressing for a moment. You said you called your children

21 because you wanted them to spend the night at the house?

22 A. That's correct.

23 Q. Where do they normally spend the night?

24 A. It's split between my ex-wife and me.

25 Q. Well, you're lucky enough she lives in the valley?

CERTIFIED COURT TRANSCRIPT

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1 A. Yes.

2 Q. So your kids get to stay?

3 A. Yes.

4 Q. Now, again, I want to come back to this because I

5 think it's important. You can't see what's in this person's

6 hands. Can you see this person's hand?

7 A. The only thing I remember seeing was the movement.

8 Q. So something like this (demonstrating)?

9 A. Uh-huh (affirmative).

10 Q. Then this person got onto the bike, and rode through

11 the path and pattern you've already described?

12 A. That's correct.

13 Q. Pretty close. You're back to the car, your children

14 are back to the car?

15 A. That is correct.

16 Q. Tell me why, so I understand. You genuinely felt

17 this person had a firearm and was pointing it at you? Why

18 would you insist on taking your children and keeping your

19 children within range of that firearm? Why not go away?

20 A. I had asked the children to get down onto the floor

21 in the backseat of the car.

22 Q. I understand that. But you're following a person

23 down the highway that you think is armed, right? You're

24 scared. You think he has a gun, and you're chasing him?

25 A. That's correct.

CERTIFIED COURT TRANSCRIPT

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1 Q. You've already called 911, hoping the sheriff is on

2 the way. Why not follow this person at a safe distance, or

3 let them go and not endanger your children? I'm having

4 trouble understanding your state of mind here.

5 A. My state of mind was such, I wanted to try to help to

6 apprehend the individual so they didn't get away with the

7 crime that had been committed against me and my family.

8 Q. And I understand. If in fact the person you were

9 chasing on the bicycle, you testified turned back again, had

10 fired a weapon at you, I am assuming it might have hit you?

11 A. That is correct.

12 Q. And you might have crashed the car?

13 A. That is correct.

14 Q. And your children would be in that crash because you

15 were chasing that person, correct?

16 A. We were very low speed following a bicycle.

17 Q. Do you think the low speed would have protected them

18 from a bullet?

19 A. No. I had asked them to get on the floorboard of the

20 car.

21 Q. Well, my question was, did you think it would protect

22 them from a bullet?

23 A. Yes.

24 Q. The speed?

25 A. No, by being on the floorboard of the car.

CERTIFIED COURT TRANSCRIPT

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1 Q. I see. I can only assume the intensity of the level
2 of catching this person, the yelling, the "hey," chasing
3 people all around, made you do it.
4 When you say low speed, was there some impairment that was
5 causing this bicycle to be pedaled at low speed?
6 A. Yes. The individual was attempting to hold a towel
7 over his head and ride the bicycle at the same time.
8 Q. Now, at that point then, when there is the one hand
9 holding the towel, the one hand on the handle bars, which hand
10 comes back and gestures, yet again, to you, that makes you
11 think you're about to be fired on? Which hand was it, the
12 handle bar hand or the towel hand?
13 A. Actually I believe it would have been the towel hand.
14 Q. And did the towel come off at that time?
15 A. Not at that time. It was still laying draped over
16 the head.
17 Q. And then at this slow speed, brights on, you are
18 virtually on top of this bicycle?
19 A. That's correct.
20 Q. And in fact there's an overhead lamp somewhere?
21 A. That's correct.
22 Q. Is the lamp behind you guys, directly overhead or on
23 ahead?
24 A. Right at the point of impact is where the street
25 light is.

CERTIFIED COURT TRANSCRIPT

101

1 Q. So straight up?
2 A. Straight up.
3 Q. Now, with your statement that once the towel was
4 gone, the proximity and the lighting, and now this person
5 reaches back, one hand on the handle bars, reaches back like
6 this, and this is where you see all of that, right?
7 A. That is correct.
8 Q. What is that you think you see in his hand?
9 A. Again, I assume it's a weapon.
10 Q. Well, what is it that you see? If you're 6 feet
11 away, or somewhere in that proximity, and he's in your
12 brights, I can only assume you have an absolutely perfect view
13 of his hand.
14 A. When the arm came around, I didn't wait to see.
15 That's when I hit him with my car.
16 Q. I understand. But you testified at some point,
17 because there was a gesture backwards, you thought you were
18 going to be shot. Tell me what was here to shoot you, is what
19 I'm trying to figure out.
20 A. Like I said, I just noticed when the hand came back
21 like that, I hit him.
22 Q. And you could not see anything in the hand?
23 A. I could not physically see something in the hand.
24 Q. But you had a good view of the hand?
25 A. No, not really.

CERTIFIED COURT TRANSCRIPT

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1 Q. Was this hand holding anything else, bigger, smaller
2 in the palm, wrapped up?
3 A. Not that I've noticed.
4 Q. You testified as to the T-shirt, testified as to the
5 shorts and testified as to the backpack. How about shoes?
6 Did you have this individual well enough in your sight to see
7 what kind of shoes he had on?
8 A. Actually I do not remember the shoes.
9 Q. Well, anything like elbow pads, knee pads, things
10 that people like that, that ride bicycles, wear?
11 A. Not that I noticed.
12 Q. How about gloves?
13 A. I did not remember that either.
14 Q. Since you did have all of the others, is it a fair
15 assumption to say if there had been gloves you would have seen
16 them?
17 A. Not necessarily.
18 Q. Given the fact that you ran this person down, they
19 got up, they handled the bicycle, they were within 6 to
20 7 feet, the length of your hood, you saw him trying to play
21 with the bicycle. I'm assuming all of those things would put
22 you in a perfect place to see whether or not this individual
23 had gloves on or not.
24 A. I was not focused on whether or not he had gloves on
25 or not.

CERTIFIED COURT TRANSCRIPT

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1 Q. I understand. Would you have been in a place to see
2 whether they had been there?
3 A. I would have been in a place to see if they had been
4 there.
5 Q. And you don't recall?
6 A. I don't recall.
7 Q. In fact, that's consistent with your testimony you
8 gave at the preliminary hearing. You couldn't see any gloves
9 at all; is that correct?
10 A. That's correct.
11 Q. Now, you indicated when Mr. Low asked you if you had
12 seen any photographs of Mr. Shepherd, you indicated that
13 Deputy Winterton asked you to look at a photograph.
14 A. We looked at some photographs, yes. There were
15 several.
16 Q. So there were a number of photographs?
17 A. There were several.
18 Q. Seven?
19 A. No, two or three.
20 Q. So it would be your testimony, as I understand it,
21 that Deputy Winterton called you and said, "Come on down to
22 the sheriff's office, and we're going to have you look at some
23 things." Is that sort of the way the conversation went?
24 A. That is correct.
25 Q. In your preliminary hearing you testified that that

CERTIFIED COURT TRANSCRIPT

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1 was within -- around two weeks after this happened Is that
2 still your memory?
3 A I don't remember the exact timeframe It was shortly
4 thereafter
5 Q Do you remember testifying on November 13th, 2002,
6 these fact?
7 A I do
8 Q Do you recall what you said at that time relating to
9 timeframe?
10 A Not exactly
11 Q Do you recall saying at that time that you thought
12 you had seen several photographs?
13 A Yeah, actually he had a book of them
14 Q And is it your testimony that you picked a photograph
15 of Mr Shepherd out of this book of photographs?
16 A No I was shown his picture
17 Q And only his picture?
18 A We had looked at a couple of other pictures prior to
19 that
20 Q That's what I'm trying to figure out here Were you
21 or were you not shown more than one photograph?
22 A I did see more than one photograph
23 Q And that you then would have, of these photographs
24 you saw, you would have picked Mr -- or did pick
25 Mr Shepherd's photograph out?

CERTIFIED COURT TRANSCRIPT

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1 A Yes, upon seeing his photograph, that's correct
2 Q Is that after you rejected other photographs? In
3 other words, did he show you A, and you said no, and then B
4 and you said no, no Is that the procedure?
5 A There were a couple that he just said, "Is this the
6 individual " And I said, "No, it is not."
7 Q How many of those do you think there was?
8 A There were two or three
9 Q Well, so at some point he showed you a picture and it
10 turned out to be Mr Shepherd, and you said yes?
11 A Yes
12 Q You're absolutely certain that's how it happened?
13 A That's how I remember it
14 Q I want to make one more observation You didn't see
15 all of these photographs together at one time, is that
16 correct? In other words, there weren't what we would normally
17 call a photo spread, eight photographs there of people who
18 look similar, and you say, "it's number five," like a line up
19 or something?
20 A No, it was not that way
21 Q In fact, it was a single type of thing at a time?
22 A That's correct
23 Q Any doubt in your mind that's how it happened,
24 relating to the photographs?
25 A Not that I remember

CERTIFIED COURT TRANSCRIPT

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1 Q After this incident, the next time you have any
2 contact, as Mr Low asked you, the next time you have any
3 contact relating to Mr Shepherd then is a photograph?
4 A That's correct
5 Q And next time after that is November 13th, when there
6 is somebody like this sitting next to me, correct?
7 A That is correct
8 Q Well, nobody else is next to me?
9 A That is correct
10 MR SAVAGE That's all I have Thank you, sir
11 THE COURT Mr Low, anything else?
12 MR LOW Nothing
13 THE COURT You may step down Members of the jury,
14 the Court is going to take a short recess and then we'll come
15 back
16 (Recess held)
17 THE COURT We'll return to the case of State versus
18 Ron Shepherd The defendant is present with his attorney, and
19 Mr Low for the State And the jury is present in the jury
20 box
21 Call your next witness, Mr Low
22 MR LOW Thank you The State calls Dustin Ward
23 THE COURT Okay, Mr Ward, come over here, stand in
24 front of the clerk and take an oath
25 DUSTIN WARD

CERTIFIED COURT TRANSCRIPT

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1 Called by the State, having been duly
2 Sworn, was examined and testified as follows
3 THE CLERK You do solemnly swear that the testimony
4 you are about to give in the case now before the Court will be
5 the truth, the whole truth and nothing but the truth, so help
6 you God?
7 THE WITNESS I do
8 THE COURT Have a seat right up here
9
10 DIRECT EXAMINATION
11 BY MR LOW
12 Q What is your name?
13 A Dustin Ward
14 Q Spell your last name?
15 A W-A-R-D
16 Q And where are you currently residing? You don't need
17 to name the city Are you in prison right now?
18 A Yes, I am
19 Q You've previously pled guilty to a burglary charge,
20 is that right?
21 A Yes, I have
22 Q And I guess this is the person's home you
23 burglarized, seated here?
24 A Yes
25 Q Looking at you now, your head is shaved a little

CERTIFIED COURT TRANSCRIPT

108

1 closely there. What color is your hair?
 2 A. Brown.
 3 Q. And your beard?
 4 A. Brown -- black, I guess.
 5 Q. More towards black than brown?
 6 A. Yeah.
 7 Q. How about on top?
 8 A. It's dark brown.
 9 Q. Have you --
 10 A. My hair has always been short.
 11 Q. What was your hair like back in June of last year?
 12 A. Pretty much like this. Had a goatee, too.
 13 Q. Some facial hair?
 14 A. Yes.
 15 Q. Do you recognize the individual seated here at
 16 counsel table?
 17 A. Yes.
 18 Q. What is his name?
 19 A. Ron Shepherd.
 20 Q. How long have you known him?
 21 A. Probably 13, 14 years.
 22 Q. Prior to, or up to June 23rd or 24th of last year,
 23 2002, what was your relationship like with Mr. Shepherd.
 24 A. Friends for many years. We were best friends.
 25 Q. What kinds of things did you do together?

CERTIFIED COURT TRANSCRIPT

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1 A. Everything, like best friends do. We did everything
 2 together.
 3 Q. At this point in time what's your relationship like
 4 with Mr. Shepherd?
 5 A. Not good.
 6 Q. I just want to make sure we understand. As of
 7 June 23rd and 24th what was your relationship like with
 8 Mr. Shepherd?
 9 A. As of?
 10 Q. As of a year ago?
 11 A. We were friends, yeah, we were fine then.
 12 Q. Since were you arrested because of that burglary?
 13 A. Yeah.
 14 Q. When were you arrested?
 15 A. The next morning.
 16 Q. Have you had any contact with Mr. Shepherd between
 17 the next morning when you were arrested and today?
 18 A. No.
 19 Q. But your relationship with him has soured in that
 20 time?
 21 A. Yeah.
 22 Q. Just generally speaking, why?
 23 A. From the burglary and what happened. Some things
 24 have happened with my family that I feel he's responsible for,
 25 things that I know he's capable of doing.

CERTIFIED COURT TRANSCRIPT

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1 Q. When you were arrested did you confess your
 2 involvement?
 3 A. Yes, I did.
 4 Q. Did you indicate that Mr. Shepherd was with you?
 5 A. Yes, I did.
 6 Q. After you indicated Mr. Shepherd was with you there
 7 in that burglary, what sort of things happened that you think
 8 he may have done?
 9 A. Phone calls to my family --
 10 MR. SAVAGE: Objection, Your Honor. This is purely
 11 speculative. If he has some foundation for this --
 12 THE COURT: He's already testified he's been in
 13 custody since that time.
 14 MR. LOW: Right.
 15 THE COURT: So anything that he would known would be
 16 from --
 17 MR. LOW: Hearsay. I'm not using it to show the
 18 proof that Mr. Shepherd did these things. We're showing his
 19 attitude is based upon something that happened after the
 20 burglary. It's belief, not truth.
 21 THE COURT: I'm going to sustain the objection. It
 22 is speculative. He's already testified that things have
 23 occurred to his family that he thinks Mr. Shepherd was capable
 24 of doing. And to go further than that --
 25 MR. LOW: Might be disparaging?

CERTIFIED COURT TRANSCRIPT

111

1 THE COURT: Yeah.
 2 Q. (BY MR. LOW) To make one thing clear, these were bad
 3 things?
 4 A. Yes.
 5 Q. Did you feel like these were retaliation to you?
 6 A. Yeah.
 7 MR. SAVAGE: Objection.
 8 MR. LOW: Fine we won't go into specifics.
 9 Q. (BY MR. LOW) Let's go back in time a little bit.
 10 June 23rd, 2002 it's a Sunday. What are you doing, where are
 11 you?
 12 A. Twenty-third, I think I was arranging to switch cars
 13 with my friend Travis.
 14 Q. Did you in fact switch cars with Travis that day?
 15 A. Yeah, I did.
 16 Q. What car did you get?
 17 A. I got his Toyota truck.
 18 Q. What car did he get?
 19 A. My Mustang.
 20 Q. Did you go riding around in that truck?
 21 A. Yeah. I was staying out in Tooele, and he was
 22 staying in Salt Lake. So back and forth. Yeah, I had been
 23 around in it.
 24 Q. After swapping cars with Travis, or truck and a car,
 25 where did you go?

CERTIFIED COURT TRANSCRIPT

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1 A Umm, I think I went over to Mr Shepherd's house to
2 see his sister
3 Q You may be thinking too hard I don't need to know
4 every place you went Eventually you wound up at
5 Mr Shepherd's house?
6 A Yes
7 Q Where is that at?
8 A West Valley
9 Q And you went to see Mr Shepherd's sister?
10 A Yeah
11 Q While talking to Mr Shepherd's sister, did you
12 notice anything that caused you concern?
13 A Yeah
14 Q What did you see?
15 A My backpack
16 Q What is that?
17 A A blue and black backpack
18 Q Why would your backpack have been over at
19 Mr Shepherd's house?
20 A Maybe a month and a half, two months ago I had left
21 it over there with a Playstation game in it And I was
22 suppose to come pick it up the next day, but I didn't make it
23 back the next day When I finally did get over to get it, he
24 said something had happened to it
25 Q Well, this has things in it still, but is this the

CERTIFIED COURT TRANSCRIPT

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1 backpack you're referring to?
2 A Yeah
3 Q It's more purple
4 A Yeah, but that's my backpack
5 Q I'm sorry You had taken your Playstation in that
6 over to Mr Shepherd's house?
7 A Yeah
8 Q Did you play with the Playstation over there?
9 A Yes
10 Q Did you leave it there?
11 A I left it there for about half an hour I had to
12 pick up my girlfriend I came back and he was playing it, and
13 she was in a hurry and I said, "Hold on to it I'll come back
14 and pick it up tomorrow "
15 Q Did you come back the next day?
16 A I don't think so Make a couple days
17 Q Did you retrieve your Playstation then?
18 A No He said he had left it over at a friends I
19 said, "We need to get that back " Couple days went by, and I
20 kept calling and stopping by and he never had it Finally he
21 said, "Well my friend went to jail " I said, "Where's the
22 game at?" But he said if he's in jail, we can't get it And
23 I kept saying, "Let's go over to his house and see We never
24 did go over for his house
25 Q Let's not go into it too much You were looking for

CERTIFIED COURT TRANSCRIPT

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1 the Playstation and the backpack?
2 A Yes
3 Q Well that day when you saw it what happened?
4 A I was waiting for her to get ready and looked over
5 in the closet and the backpack was sitting there And I
6 thought, "What the hell? He ain't suppose to have this " And
7 I started looking around for the Playstation And she started
8 having a fit And I said, "I'm taking this " Took everything
9 that was in the backpack and dumped it out And I went into
10 the kitchen and called him --
11 MR SAVAGE Objection in terms of question and
12 response
13 THE COURT Let's go question and answer
14 Q (BY MR LOW) I'm sorry You saw the backpack there in
15 Mr Shepherd's sister's bedroom?
16 A Yeah
17 Q Did you look in it?
18 A Yeah
19 Q Was your Playstation in it?
20 A No
21 Q What was?
22 A I think there was some gloves, maybe a little tool
23 kit, little Crest lozenge thing
24 Q What was in it then?
25 A I don't know what was in it then

CERTIFIED COURT TRANSCRIPT

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1 Q Initially did you see any drugs in it?
2 A Yeah
3 Q Well, what did you do with the things in the
4 backpack?
5 A Laid them out on the floor
6 Q Did you call your friend?
7 A Yeah
8 Q What did you tell him?
9 A I said "Guess what I just found?" And he said,
10 "What?" And I said, "My backpack that's suppose to be
11 missing " And then we was cut off, and ten minutes later he
12 came home
13 Q When he came home did you discuss the contents of
14 that backpack?
15 A Yeah
16 Q Did he tell you what the contents was all about?
17 A Yeah
18 Q What he tell you?
19 A It was meth
20 Q Was it worth some money?
21 A Yeah
22 Q Was he afraid you had taken it?
23 A Yeah
24 MR SAVAGE I'll object to this No foundation, no
25 identification, and now lastly he's testifying as to

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1 somebody's state of mind.
2 MR. LOW: He just reviewed the statement. Admission
3 against interest.
4 THE COURT: Overruled.
5 Q. (BY MR. LOW) Was he concerned that you had taken his meth?
6 A. As soon as he got there.
7 Q. After you had your backpack and he had his meth, what
8 did you guys do?
9 A. The whole reason I was there was to buy some meth.
10 Me and his sister was going to go get some.
11 Q. Once you learned Mr. Shepherd had some meth, did you
12 buy it from him?
13 A. No, I didn't have any money on me. I had to cash a
14 check.
15 Q. What kind of check?
16 A. Tax check.
17 Q. How much were you going to buy?
18 A. \$40 worth.
19 Q. Is \$40 worth very much?
20 A. Half gram. No.
21 MR. SAVAGE: Can we approach?
22 THE COURT: Yeah.
23 (Bench conference held.)
24 Q. (BY MR. LOW) If I could show you what's marked as State's
25 Exhibit 7. Do you recognize that?

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1 A. Yes.
2 Q. What is that?
3 A. My tax refund.
4 Q. The check or just the stub?
5 A. Just the stub.
6 Q. So you tore the check off and cashed that?
7 A. Yeah.
8 Q. This is for \$116; is that right?
9 A. Yes.
10 Q. What did you do with \$40 of that tax refund check?
11 A. Bought meth with it.
12 Q. From whom?
13 A. Ron.
14 MR. LOW: Move to admit State's Exhibit 7.
15 THE COURT: Any objection?
16 MR. SAVAGE: Just subject to our conference at the
17 bench.
18 THE COURT: The court is going to receive it.
19 >>>
20 (State's Exhibit No. 7
21 Was received into evidence.)
22 Q. (BY MR. LOW) Did you discuss any other activities you
23 might want to do together that day?
24 A. We talked about going riding, mountain biking.
25 Q. Did you have your bike with you?

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1 A. Yeah.
2 Q. Where was it?
3 A. In the truck.
4 Q. The bed of the truck?
5 A. Yes.
6 Q. What kind of truck was it?
7 A. A Toyota pickup with a shell on it.
8 Q. Did Mr. Shepherd like the idea of going on a bike
9 ride?
10 A. Yes --
11 MR. SAVAGE: Objection. He can testify whether he
12 did something, but not whether he likes it.
13 THE COURT: Sustained.
14 Q. (BY MR. LOW) Did Mr. Shepherd tell you whether he would
15 like to go on a bike ride with you?
16 A. Yes.
17 Q. Well, what time of day are we now?
18 A. It was probably around 5:00 or 6:00.
19 Q. Where did you decide to go?
20 A. Once we decided to go, we decided to go up around
21 Park City, Midway, up in the mountains.
22 Q. Did you go in the truck that you were borrowing or
23 trading with your friend?
24 A. Yes.
25 Q. Who was driving?

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1 A. Ron was.
2 Q. Ron was driving the car that you had borrowed and
3 swapped?
4 A. Yeah.
5 Q. Any special reason Ron was driving it?
6 A. No, no special reason. He just wanted to drive.
7 Q. Did you proceed out of Salt Lake and proceed into the
8 Park City, Wasatch County area?
9 A. No. We stopped.
10 Q. Stopped along the way?
11 A. Yeah.
12 Q. Did you eventually end up here?
13 A. Yeah.
14 Q. And where did you park the truck?
15 A. Up in Midway.
16 Q. And Mr. Shepherd was driving?
17 A. Yeah.
18 Q. Where did he end up parking it?
19 A. Just in the parking lot, up in the condos I guess, in
20 the resort.
21 Q. Do you know the name of that resort?
22 A. All I know is the Midway -- the Homestead.
23 Q. The Homestead?
24 A. Yeah.
25 Q. After parking there, what time of day or night are

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1 we?

2 A. It was dusk about this time, so probably 8:30, 9:00,

3 right in there.

4 Q. Well, between the time you left Salt Lake and parked

5 at the Homestead, did you consume any methamphetamine?

6 A. Yes, I did.

7 Q. Did Mr. Shepherd consume any?

8 A. Yeah.

9 Q. How was it consumed?

10 A. Smoked it.

11 Q. Did both of you consume it?

12 A. Yes.

13 Q. Did you consume all that you had?

14 A. No.

15 Q. Did you consume yours, or his or both?

16 A. I think we both put in on it a little bit.

17 Q. Both contributed?

18 A. Yeah.

19 Q. After parking there -- it's dusk, 8:30 or so -- what

20 did you decide to do?

21 A. Go riding. Pulled the bikes out, put them together.

22 We rode through the golf course, down the pass, down into

23 Midway, I believe it is, to the little gas station where he

24 was working on his bike. I filled up the water.

25 Q. Were you guys looking to burgle a house that

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1 night?

2 A. No.

3 Q. What were you look to go do?

4 A. Just go riding. We was just riding.

5 Q. At some point I guess it gets pretty late?

6 A. Uh-huh (affirmative).

7 Q. At some point did you find a house you were curious

8 about?

9 A. Yeah, I did.

10 Q. Where was that house located? Do you remember?

11 A. East of the golf course, I believe it is, of the

12 Homestead.

13 Q. Homestead golf course?

14 A. Yeah.

15 Q. Who was the first one to approach the house or

16 comment about the house? Do you remember?

17 A. Me.

18 Q. What did you say about it?

19 A. I thought it was a new house getting built, and I

20 wanted to check it out. So I told him, "Let's check it out,"

21 cause it had -- in the driveway it had like buckets, to where

22 it had just been poured, not to drive on it. And all the

23 other houses around it were just getting built, so I assumed

24 it was brand new.

25 Q. So you saw the concrete was new?

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1 A. Yeah.

2 Q. Were you driving on the front side of the house or

3 the backside?

4 A. We was coming down the street. I guess we would have

5 come at it from the east side, down the driveway around to the

6 back.

7 Q. So you drove on the concrete on the front of the

8 house?

9 A. Yes.

10 Q. Around the side of the house?

11 A. Yes.

12 Q. Did you park your bikes?

13 A. Yes.

14 Q. Where did you go then?

15 A. On the back I think it was a deck, and walked around

16 the house, looked at things. I think I checked the door, and

17 I think it was locked. And a window was open.

18 Q. Did you go through the window?

19 A. Yes, I did.

20 Q. Were you the first one in the house?

21 A. Yes.

22 Q. After you got in the window, did you proceed alone

23 inside the house?

24 A. Just to open the door.

25 Q. Why did you open the door?

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1 A. So Ron could come in.

2 Q. How did you know Ron wanted to come in?

3 A. I assumed he did. He was standing there. And I just

4 opened the door and he come in.

5 Q. After you opened the door and he came in, where did

6 you guys go?

7 A. I think it was into the kitchen, maybe the garage,

8 looking around a little bit, and then upstairs.

9 Q. What was the interior of the house like? What did it

10 look like?

11 A. There was furniture, but it was all piled into the

12 middle of the room. There was everything out of the kitchen.

13 Looked like the carpet or flooring, they were redoing it.

14 Q. Did it look like they were doing tile or --

15 A. I don't remember whether it was carpet or tile, but

16 they were doing something.

17 Q. Did you ever go and open the refrigerator?

18 A. Yeah, I did.

19 Q. What did you, if anything, take out of the

20 refrigerator?

21 A. Yeah, I took a Coke.

22 Q. Did you consume anything?

23 A. No. I had to leave that.

24 Q. Did you take any milk out of the refrigerator?

25 A. I might have taken the milk out and put it on top to

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1 get to a coke
2 Q Did you take any ice cream out of the freezer?
3 A No, I didn't take any ice cream
4 Q Did you proceed upstairs?
5 A Yeah
6 Q Is Ron with you the whole time or were you going
7 separate ways?
8 A I think we were going separate ways
9 Q So he's exploring different parts of the house while
10 you're exploring different parts?
11 A Uh-huh (affirmative)
12 Q At any rate, did you wind up in an upstairs bedroom
13 together?
14 A Yes It had a little bathroom in it and faces the
15 back north I don't which direction it was The toilet was
16 in the room itself
17 Q When you went up there and Mr Shepherd was also in
18 that room with you, did you find anything you liked that you
19 wanted to take?
20 A I was in the closet and he had -- all of the
21 furniture was in the middle There was a desk, which turned
22 out to be a computer desk, and dresser with things in it In
23 the closet was clothes and boxes of stuff In the closet I
24 found a pair of binoculars and a knife that I took
25 Q Did Mr Shepherd find anything he wanted to take?

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1 A He found, I think it was --
2 MR SAVAGE We're talking about state of mind He
3 can talk about what happened He can't talk about what
4 Mr Shepherd wants to do
5 THE COURT Just ask him what he observed him do
6 Q (BY MR LOW) Did you observe Mr Shepherd take anything?
7 A Yeah
8 Q Did he talk to you while he was taking it?
9 A Yeah
10 Q Did he express his desires while doing that?
11 A He took a little pocket TV He wanted to take the
12 computer
13 Q How do you know he wanted to take the computer?
14 A He told me he did "I want the computer"
15 Q Let me show you State's Exhibit 5 Do you recognize
16 that?
17 A Yeah
18 Q Is that the TV that Mr Shepherd took?
19 A Yeah
20 Q Do you know where that was?
21 A It was in -- I'm not sure which drawer it was in, but
22 it was in the dresser
23 Q How about the computer; where was it?
24 A It had an enclosed computer like thing that closed
25 up

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1 Q Like an armoire where the doors open up?
2 A Yes
3 Q What did he say about the computer again?
4 A He wanted the tower part of the computer
5 Q Did you see him doing anything with that?
6 A Unhooking it
7 Q Did you remain in there while he unhooked that?
8 A I think I went downstairs
9 Q Before you go downstairs, I want to show you State's
10 exhibits 8 and 9 Is that the knife you took?
11 A Yes
12 Q Are those the binoculars you took?
13 A Yeah
14 MR LOW Move to admit 8 and 9
15 THE COURT Any objection?
16 MR SAVAGE No
17 THE COURT They're received
18
19 (State's Exhibit Nos 8 and 9
20 Were received into evidence)
21 MR SAVAGE His testimony is those were the items
22 that Mr Ward took?
23 MR LOW Yes
24 Q (BY MR LOW) After you saw Mr Shepherd was unhooking the
25 computer, you went downstairs you said?

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1 A Yes
2 Q What was the purpose in going downstairs?
3 A Get a drink cause I left the drink I took, the Coke
4 I went down to get that When I got that I heard voices I
5 automatically went out the back door and I was looking through
6 the windows and I heard people again And I whistled and I
7 ran
8 Q What kind of whistle?
9 A (Demonstrating)
10 Q Louder than that?
11 A Yeah
12 Q What was your purpose?
13 A Letting him know
14 Q Did you assume these were the homeowners?
15 A I had no idea
16 Q After you whistled for Mr Shepherd, what did you do?
17 A I ran out the back, north, up to a little road,
18 headed west a quarter mile, down through the golf course, down
19 through a river to another brand new house getting built and
20 hung out until the next morning
21 Q Is that where you slept that night?
22 A Yeah
23 Q How long before you got up or got out of that house
24 were you arrested?
25 A 20 minutes

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1 Q So after you whistled for Mr Shepherd did you see
2 him again?
3 A No
4 Q In fact, after you left the upstairs room where he
5 was getting the computer, that was the last time you had seen
6 him?
7 A Yes
8 Q Why didn't you go back to the truck?
9 A I didn't have keys
10 Q Who had the keys?
11 A Ron did
12 Q Why didn't you take your bike with you?
13 A I just ran
14 Q So you were stranded there in Midway?
15 A Yeah
16 Q After you were arrested, did you talk to law
17 enforcement?
18 A Yeah
19 Q Did you talk to Sergeant Winterton here?
20 A Yes
21 Q And did you tell Sergeant Winterton you were involved
22 in that robbery?
23 A Yes
24 Q Did you tell him who else was involved in that
25 robbery with you?

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1 A Yes
2 Q Who did you say?
3 A Ron Shepherd
4 Q Did you see Mr Shepherd with the ice cream?
5 A No, I didn't
6 Q Except for what you're hearing now, you didn't know
7 anything about any ice cream being eaten?
8 A That's right
9 Q After you've confessed to this crime, have you plead
10 guilty to it?
11 A Yes, I did
12 Q Is that the reason you're now in prison?
13 A Yes, it is -- well, no -- yeah, it is
14 Q Are there other reasons?
15 A I had other charges, but this initially sent me to
16 prison yes
17 Q Were you on probation for other charges?
18 A Yes, I was
19 Q Just to make sure, prior to this day, June 23rd, did
20 you have any reason the time you were talking to Sergeant
21 Winterton, to lie and say Mr Shepherd was there, and lie if
22 he hadn't been?
23 A No
24 Q At that time you thought you were still friends?
25 A Yeah

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1 MR LOW Nothing further
2 THE COURT Mr Savage cross
3
4 CROSS-EXAMINATION
5 BY MR SAVAGE
6 Q Mr Ward, let's start with the fact that you're in
7 prison now You were originally charged in this matter, as I
8 understand it -- and I'm look looking at the information filed
9 in the court file "State of Utah verses Dustin Ward " Is
10 your date of birth 07/06 of '72?
11 A Yes
12 Q And this information, which is a matter of public
13 record and out of the court file, indicates that you were
14 charged, Count 1, Burglary a Second Degree Felony, Count 2,
15 Possession or Use of a Controlled Substance, a Second Degree
16 Felony, Count 3, Theft, a Class B Misdemeanor And then
17 there's number four We're in agreement we're not dealing
18 with all of that
19 Because you have been present, because you've been in
20 prison, because you know these things, do you know what the
21 penalty is for a Second Degree Felony?
22 A Yes, I do
23 Q Tell the jury what the penalty is for each one of
24 these Second Degree felonies?
25 A The penalty is a one year to 15 year sentence, for

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1 each one of them I'm not sure what the fine is just what
2 the time is
3 Q Well, isn't it true that those felonies may run
4 consecutive, that means one after the other?
5 A Yes, it is
6 Q So you were charged in this case with things that
7 could have placed you, theoretically, in prison for 30 years?
8 A Yes, I have
9 Q And you agreed to testify against Mr Shepherd?
10 A Yes
11 Q And I'm now holding the Statement in Advance, meaning
12 those things you have admitted doing, and what has occurred as
13 a result of that
14 A Uh-huh (affirmative)
15 Q Isn't it true that the Burglary, a Second Degree
16 Felony, was reduced to one Third Degree Felony?
17 A Yes, it was reduced
18 Q What is the penalty for a Third Degree Felony, at
19 worst?
20 A Five years
21 Q Instead of 15?
22 A Yes
23 Q And isn't it true that you pled guilty to attempted
24 possession or use of a controlled substance?
25 A Yes

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1 Q. And wasn't that made into a misdemeanor?
2 A. A Class A Misdemeanor, yes.
3 Q. Not even a felony?
4 A. Yep.
5 Q. Isn't it true there were recommendations made on your
6 behalf, that these would run concurrently, not consecutively?
7 A. Yep.
8 Q. And concurrently means they would run at the same
9 time; isn't that correct?
10 A. Yep, yep.
11 Q. So every day you are in prison, on one day
12 "Sentence 1" gets a day and "Sentence 2" gets a day, but
13 you've only done one day?
14 A. Yeah.
15 Q. Isn't it also true in this case that Mr. Low, the
16 prosecutor who has just cross examined you, also agreed to
17 write a letter on your behalf to the Board of Pardons,
18 recommending that you be given credit for the time you were in
19 jail here?
20 A. Yes.
21 Q. And all of this occurs if and only if what? What
22 triggers this magic deal?
23 A. If I pled guilty to the 0 to 5.
24 Q. And?
25 A. To testify.

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1 Q. And testify.
2 A. Yeah.
3 Q. And that's what you're doing here today?
4 A. Yeah.
5 Q. Prior to these convictions what was your most recent
6 felony conviction?
7 A. 2000. It was forgeries, two forgeries.
8 Q. What level of forgery was that? What type of felony?
9 A. Third degree.
10 Q. And before that?
11 A. Fraud.
12 Q. And what level of felony was that?
13 A. Third degree.
14 Q. And before that?
15 A. Stolen vehicle.
16 Q. What level of felony was that?
17 A. Stolen vehicle?
18 Q. Excuse me. Yes.
19 A. It was a Third Degree.
20 Q. These are all prison sentence possibilities, right?
21 A. Yeah.
22 Q. Before that, what was your next prior felony?
23 A. I believe it was a stolen vehicle.
24 Q. Again?
25 A. Yeah.

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1 Q. And was that a third degree also?
2 A. It was dismissed.
3 Q. Before that?
4 A. Everything --
5 MR. LOW: I think counsel needs to limit it -- the
6 same thing applies for my witnesses to his witnesses -- to
7 crimes that are felonies.
8 MR. SAVAGE: That's what I'm asking, what felonies
9 he's been convicted of.
10 THE COURT: Other than those indicated, do you have
11 any other prior felony convictions.
12 THE WITNESS: No, I don't.
13 Q. (BY MR. SAVAGE) At the time of June 23rd, you had how many
14 felony convictions on your record already?
15 A. Seven.
16 Q. And you've given us three instances. Were there
17 multiple felonies in those?
18 A. Yeah, they were all put together.
19 Q. So you've been convicted of seven felonies prior to
20 June 23rd?
21 A. Yeah.
22 Q. So when you say that this is what put you in prison,
23 this instant case, or the case that you are involved in here,
24 were you on probation at that time?
25 A. Yes, I was.

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1 Q. And violated your probation on all of those other
2 felonies?
3 A. Yeah.
4 Q. In addition to pleading guilty to felonies which
5 would, by themselves, put you in prison?
6 A. Yeah.
7 Q. You've been asked by Mr. Low whether when you were
8 arrested you confessed. Do you recall that question?
9 A. Yeah.
10 Q. And he indicated to Officer Winterton, the gentleman
11 seated to his left?
12 A. Yes.
13 Q. But that's not who you talked to first, is it?
14 A. No.
15 Q. In fact, you were interviewed by another officer;
16 isn't that true?
17 A. Yeah.
18 Q. And you told that officer you never went in the
19 house?
20 A. Yeah.
21 Q. So you lied?
22 A. Yep.
23 Q. So you lied to the police officer when you were first
24 arrested?
25 A. Yeah -- I wasn't arrested. He asked me if I went in

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1 the house. I said, "No." Sergeant Winterton pulled up. He
 2 asked me. I said, "Yeah."
 3 Q. So the first officer you spoke to, you were lying to?
 4 A. Yeah.
 5 Q. Your friend with whom you switched the car for the
 6 truck, Travis, there's a little more to the story there, isn't
 7 there?
 8 A. Yeah.
 9 Q. Travis was a federal fugitive, wasn't he?
 10 A. Yeah.
 11 Q. And you took his truck so the authorities could not
 12 find your friend Travis, the federal fugitive; isn't that
 13 correct?
 14 A. Yeah.
 15 Q. So by doing that, you were actually assisting him in
 16 terms of not being arrested for something?
 17 A. Yeah.
 18 Q. And you knew that at the time, didn't you?
 19 A. Yeah.
 20 Q. Now, you've indicated, as Mr. Low indicated to you,
 21 actually prior to June 23rd, when you're speaking with the
 22 officers, that you don't have any reason at all to be unhappy
 23 with Mr. Shepherd. Do you recall that?
 24 A. Yeah, I recall that.
 25 Q. Just now you said that.

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1 A. Yeah.
 2 Q. You testified previously, though, that's not the
 3 case, haven't you?
 4 A. I said we had a falling out about a girl, yeah. But
 5 as of that day --
 6 Q. Amongst other things?
 7 A. Yeah.
 8 Q. So you have a falling out about a girl, and you have
 9 a falling out about the Playstation?
 10 A. Yeah.
 11 Q. A minute ago Mr. Low asked you if there was any
 12 reason that you would be upset with him. You said, "No." But
 13 now we're talking, there's a girlfriend issue going here, and
 14 there's this entire thing about the Playstation; isn't that
 15 correct?
 16 A. Yeah.
 17 Q. And do you recall talking about the Playstation and
 18 how it made you feel?
 19 A. I don't recall.
 20 MR. SAVAGE: If I might, for just a moment, Your
 21 Honor. There's so many transcripts it's difficult to keep
 22 them all straight.
 23 Q. (BY MR. SAVAGE) Mr. Ward, tell me about, while I'm looking
 24 for the Playstation issue, let's talk about the girlfriend.
 25 What was her name?

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1 A. Trish.
 2 Q. And what happened between you and your girlfriend?
 3 A. We just broke up.
 4 Q. And what was Mr. Shepherd's subsequent involvement
 5 with Trisha that caused you to be unhappy?
 6 A. I just seen them together.
 7 Q. I'm sorry?
 8 A. I seen them together.
 9 Q. And haven't you previously testified that you didn't
 10 like this?
 11 A. Yeah.
 12 Q. And haven't you previously testified that this caused
 13 you some unhappiness?
 14 A. Uh-huh (affirmative).
 15 Q. Sense of betrayal?
 16 A. Yeah.
 17 Q. And in fact, some level of disappointment and anger
 18 related to Mr. Shepherd?
 19 A. Yeah.
 20 Q. You indicated just now that Mr. Shepherd and you were
 21 both doing methamphetamine; is that correct?
 22 A. Yeah.
 23 Q. Did I understand you to say where it came from?
 24 A. What do you --
 25 Q. Who brought the methamphetamine to the party?

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1 A. Yeah Ron
 2 Q. Only Ron?
 3 A. What I bought from Ron.
 4 Q. Or didn't you bring some also?
 5 A. I bought from Ron. I didn't bring any.
 6 Q. And did I understand you to say that you only used it
 7 in the parking lot?
 8 A. No, I never said that.
 9 Q. So it was all along the way?
 10 A. Yeah.
 11 Q. I wanted to make sure I understood that.
 12 Now in terms of your testimony relating to your former
 13 girlfriend -- here we go. I'm sorry.
 14 I'm going to ask you this. Do you recall this question
 15 relating to Trisha? I'm reading from the transcript.
 16 THE COURT: What page?
 17 MR. SAVAGE: Page 34. Actually -- yeah, page 34.
 18 "You indicated earlier you had been talking about your
 19 girlfriend. Is that Trish? Answer: "Yeah." "Okay, tell
 20 me -- Oh no, no, no, not that girlfriend. We broke up. Okay.
 21 Was there some animosity between and you Mr. Shepherd
 22 regarding that woman? For a minute. So the answer is yes?
 23 Yeah. Okay, why? Because me and her were close. But then I
 24 picked him up from jail one day and took him home and dropped
 25 him off and she had gotten high, and I was like I didn't want

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1 A. Jeff Winerton.
 2 Q. With whom are you employed?
 3 A. By the Wasatch County Sheriff's office.
 4 Q. How long have you been employed by them?
 5 A. Just over 13 years.
 6 Q. Are you assigned to this case?
 7 A. Yes, I am.
 8 Q. Were you -- did you arrive at the scene the night of
 9 the burglary?
 10 A. Early morning, yes.
 11 Q. On the Monday morning, I guess, June 24th?
 12 A. Yes.
 13 Q. Did you see, for example, this wrecked bicycle?
 14 A. Yes, I did.
 15 Q. Where was it?
 16 A. In the middle of the road.
 17 Q. You've seen previously -- I don't want to turn the
 18 whole contraption on -- State's Exhibit 4, where Mr. Hartman
 19 has drawn the line, the path that the bicycle took and where
 20 the hit, crash occurred, and where Mr. Shepherd then ran off
 21 to. Where on this photograph did you find the bicycle?
 22 A. Right here close to the light pole, and this driveway
 23 on the curbside of the roadway, right in this area.
 24 Q. Was it in the state it's in now?
 25 A. Yes, it was.

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1 MR. LOW: I'm trying to decide if I should admit the
 2 bike.
 3 MR. SAVAGE: I don't care.
 4 MR. LOW: Well, marking the bicycle for now as
 5 State's Exhibit 11 --
 6 MR. SAVAGE: And we will stipulate, if it helps, that
 7 the bike can be left anywhere close, so it doesn't have to be
 8 transported once admitted. In fact we could put it in the
 9 holding cell.
 10 THE BAILIFF: That's where I'll put it.
 11 THE COURT: It's received.
 12 (State's Exhibit No. 11
 13 Was received into evidence.)
 14 THE COURT: That's the red bicycle?
 15 MR. LOW: Yes, red bicycle.
 16 Q. (BY MR. LOW) You heard Mr. Hartman today testify that
 17 after falling off the bicycle, Mr. Shepherd then ran between
 18 those two houses, through the trees and creek by those houses?
 19 A. Yes.
 20 Q. Was there any evidence found in that area?
 21 A. Yes.
 22 Q. What evidence?
 23 A. A backpack.
 24 MR. LOW: And that's previously been identified as
 25 State's Exhibit Number 6. Move to admit State's Exhibit

CERTIFIED COURT TRANSCRIPT

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1 Number 6, Your Honor.
 2 MR. SAVAGE: No objection.
 3 THE COURT: It's received.
 4 (State's Exhibit No. 6
 5 Was received into evidence.)
 6 Q. (BY MR. LOW) Anything else that you found over in that
 7 direction.
 8 A. There were a number of items we found over in that
 9 direction.
 10 Q. Any key rings?
 11 A. Yes.
 12 Q. Do you have that key ring with you now?
 13 A. I do.
 14 Q. Have I marked that yet?
 15 A. No.
 16 Q. Marking that as State's Exhibit Number 12, can you
 17 identify that for the jury?
 18 A. It's a black key ring with on one side -- I call it a
 19 car beeper and small clasp. On the other end two small
 20 carabiners or clasp hooking devices.
 21 Q. Are there any keys on that key ring?
 22 A. No, there are not?
 23 Q. Did you find any keys in the backpack.
 24 A. Yes, I did.
 25 Q. Were the keys to the vehicle in the backpack?

CERTIFIED COURT TRANSCRIPT

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1 A. Yes, they were.
 2 Q. Are they still there?
 3 A. Yes, they are.
 4 Q. So this key chain had no keys attached to it?
 5 A. No, there were not.
 6 Q. Does that key chain have a name on it?
 7 A. Yes.
 8 Q. What is that name?
 9 A. Ron.
 10 Q. Where was that located?
 11 A. There was a residence on the other side of the creek,
 12 directly to the south --
 13 Q. Maybe we should point it out a little bit without
 14 turning on the machine. Looking at this --
 15 A. Under this big tree there's a residence behind.
 16 Across this embankment there's a residence that sits behind
 17 this clump of trees and a barn.
 18 Q. Well, is there a residence behind this barn we can't
 19 see?
 20 A. Yes, there is.
 21 Q. It was found under that tree?
 22 A. In the yard of that residence.
 23 Q. You heard testimony that this is the direction
 24 Mr. Shepherd went; is that right?
 25 A. Uh-huh (affirmative).

CERTIFIED COURT TRANSCRIPT

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1 Q And Mr Ward, the other burglar, which direction had
2 he gone?
3 A North the opposite direction
4 Q This television, State's Exhibit Number 5, where was
5 it found?
6 A Inside of this backpack
7 Q Was a cell phone found somewhere near the scene?
8 A Yes it was
9 Q Where was that?
10 A Near the bicycle in the roadway
11 Q Do you have that cell phone with you now?
12 A Yes, I do
13 Q Does the battery work now?
14 A Deader than dead
15 Q Phone won't turn on?
16 A No, I can't get it to turn on
17 Q On that night did it turn on?
18 A Yes, it did
19 Q Did you turn it on?
20 A Yes, I did
21 Q What did the screen say when you turned it on?
22 A It had a writing on it I don't recall if it was --
23 it was a heart, it indicated, "I love you Jenna Lynn
24 Q And the heart was it spelled out?
25 A It was LUV or a heart I don't recall right now

CERTIFIED COURT TRANSCRIPT

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1 Q Have you ever talked to Ron Shepherd about that
2 phone?
3 A Yes I have
4 Q Did he tell you whether or not that was his phone?
5 A Yes, he had He indicated it was his phone
6 Q Did he tell you how it ended up where it was?
7 A He indicated Mr Ward had stolen that phone, either
8 that or he lost it in Mr Drake's truck
9 Q So the first was it was stolen?
10 A Yes
11 Q Or?
12 A He lost it in Travis's truck, it could have been lost
13 in that
14 Q Did he tell you when he had been in that truck, if it
15 wasn't that day?
16 A I don't recall any conversation to that nature
17 Q And you recall Mr Ward's testimony that they just
18 got that truck that day or perhaps the day before?
19 A That's correct
20 Q Well, were you able to use the cell phone or check
21 its memory?
22 A I had tried to locate numbers within the cell phone
23 and was unable to The phone was locked wouldn't let us do
24 any function on it at all
25 Q You mean the key pad was locked?

CERTIFIED COURT TRANSCRIPT

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1 A Yeah trying to find out a phone number that would
2 identify the owner of the phone
3 Q This is before you know who Mr Shepherd is?
4 A That's correct
5 Q Were you notified when Mr Ward was arrested?
6 A I was there
7 Q About what time was that?
8 A Early morning, the 24th, 7 00 o'clock 7 15,
9 somewhere around in there
10 Q This is after you had been back at the scene?
11 A Oh yeah
12 Q About what time were you at the scene?
13 A I got called out of bed at 30 minutes to midnight,
14 responded to the area, attempted to apprehend any suspects in
15 the area, which I was unable to do so with the aid of many
16 officers and equipment I left officers in the area and
17 returned back up to the scene to start collecting evidence and
18 secure evidence
19 Q This is around the midnight hour then?
20 A Yes
21 Q Did you leave the area at some point?
22 A Yes, I did
23 Q Where did you go, home or the sheriff's department?
24 A We went to the Midway city offices and discussed the
25 case, and also discussed the case with the on-duty cars coming

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1 out for the morning shift of what had occurred the night
2 before and to watch for some people
3 Q That's just to notify the oncoming shift, "hey there
4 was a burglary be on the look out?"
5 A Yes
6 Q Was one of those officers Travis Jensen?
7 A That's correct
8 Q So you had informed him about the burglary a few
9 hours before?
10 A Yes
11 Q Was he the one that found Mr Ward?
12 A Yes
13 Q How soon after Officer Jensen found Mr Ward were you
14 at the scene?
15 A Within a few minutes Travis had advised me by radio
16 he had located a possible suspect walking by the roadway, or
17 up to the roadway less than half a mile away
18 Q So it was about two and a half minutes after Officer
19 Jensen had found Mr Ward How long after you staffed this
20 with Travis Jensen was it until he found Mr Ward? You
21 staffed Officer Jensen about what time?
22 A About 7 00
23 Q So within 15 minutes of your staffing this with other
24 officers you found and arrested Mr Ward?
25 A That's correct

CERTIFIED COURT TRANSCRIPT

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1 Q. Did you interview Mr. Ward?
2 A. Later at the sheriff's office, yes.
3 Q. You heard Mr. Ward testify here today?
4 A. Yes, I have.
5 Q. Is this consistent with what he told you that day
6 when you interviewed him?
7 A. Yes, it is.
8 Q. Did you offer Mr. Ward any sort of deal for telling
9 you the truth?
10 A. None whatsoever.
11 Q. Up to this point had you talked to Mr. Hartman, the
12 victim, about what these burglars might have looked like?
13 A. No, I had not.
14 Q. When Mr. Ward told you, I take it that same morning,
15 around 7:15, 7:20 somewhere in there -- you interviewed him
16 about what time?
17 A. I don't recall.
18 Q. Sometime that morning?
19 A. Yes.
20 Q. After that, after Mr. Ward told you it was
21 Mr. Shepherd that had been involved in the burglary with him,
22 what did you do about trying to figure out if the victim could
23 recognize Mr. Shepherd?
24 A. A couple days later I was still involved in obtaining
25 search warrants for trucks and following up on this case. Two

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1 days after that I made contact with a local AP&P agent.
2 Q. Is this June 26th then?
3 A. Yes, it is.
4 Q. Were you able to find Mr. Shepherd's photograph on
5 the computer?
6 A. Yes, I was.
7 Q. I show you what's been marked as State's Exhibit
8 Number 13. I've cut out some extraneous information that
9 doesn't pertain to today's hearing. What is that?
10 A. A picture.
11 Q. Is it the top part of a whole page?
12 A. It is the top part of a whole page.
13 Q. And whose picture is that?
14 A. Ron Shepherd.
15 Q. What did you do with that picture?
16 A. I contacted Mr. Hartman and asked if he could come to
17 the sheriff's office and look at some pictures, see if he
18 could identify the individual that he had seen, that he had
19 stated he knocked off his bicycle.
20 Q. Well, and did you tell him you thought you had caught
21 the right guy and this was it?
22 A. No, I did not.
23 Q. Did you tell him anything that he should identify any
24 particular person that he should identify as the person he
25 knocked off the bike?

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1 A. No, I did not.
2 Q. Did you show him more than one picture?
3 A. I probably did show him a picture of Mr. Ward,
4 co-defendant in the case.
5 Q. So you showed him a picture of Mr. Ward, who just
6 testified. Was he able to recognize Mr. Ward?
7 A. No, he was not.
8 Q. Did you show him any other pictures?
9 A. To my recollection I did not.
10 Q. Is it possible you did?
11 A. It's possible.
12 Q. If you did show him any individuals, who would that
13 have been?
14 A. There was an individual by the name of J.J. I
15 obtained in a conversation with Mr. Ward. And that was an
16 individual with Jeffrey Baker.
17 Q. Was this someone involved with him, Mr. Ward, as he
18 indicated?
19 A. No.
20 Q. It was just a new guy?
21 A. We had had numerous burglaries in the Midway area,
22 quite numerous burglaries, and I was trying to obtain
23 information about possible suspects that would lead me to
24 solving other burglaries in the area. I believe this one was
25 involved in other burglaries in the area.

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1 Q. So you might have showed him JJ's picture?
2 A. I might have.
3 Q. Did you show him Mr. Shepherd's picture?
4 A. Yes, I did.
5 Q. Did he respond to Mr. Ward's picture?
6 A. He did not.
7 Q. To JJ's picture, if you showed him?
8 A. I don't recall.
9 Q. How about this picture?
10 A. Yes.
11 Q. How long did it take for him to respond to that
12 picture?
13 A. Immediate response.
14 Q. What did he tell you?
15 A. He said this was the guy he knocked off the bike. I
16 asked Mr. Hartman how sure he was. He said I'm 95 percent
17 sure he was the guy I knocked off the bike.
18 Q. Can you see long hair or a ponytail in that picture?
19 A. No, I cannot.
20 Q. You testified before on this case; is that right?
21 A. That is correct.
22 Q. And you testified that the normal procedure you would
23 take would be through a photo lineup?
24 A. That's correct.
25 Q. Tell the jury what a photo lineup is.

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1 A. You obtain a description of a suspect in a case and
2 you take that description and type that into a computer, or
3 locate photos that would match a similar description, height,
4 weight, hair color, male or female, obviously, and pose those
5 pictures in an array of six photos in a line up. You present
6 that photo lineup to a witness, so that it's a nonbiased pick,
7 to see if the witness can identify one person out of six.
8 That is a normal procedure.
9 Q. Where is that procedure used?
10 A. When a witness is not known -- or a suspect is not
11 known, but we have a description of a suspect, and through an
12 investigation of an officer would narrow that down to some
13 possible suspects. And we would take a possible suspect that
14 law enforcement believed, maybe through investigation, may
15 have caused the crime and present that photo lineup to the
16 witness.
17 Q. If in this case Mr. Hartman had given you a complete
18 description, and you had not found Mr. Ward, would you have
19 done a photo lineup?
20 A. No, I would not have.
21 Q. Let me rephrase the question.
22 If Mr. Hartman had given you a complete description of
23 what he saw, who he saw knocked off the bicycle, and you had
24 not yet arrested Mr. Ward, so you didn't have Mr. Ward telling
25 you it was Mr. Shepherd there, would you have considered a

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1 photo lineup in that investigation?
2 A. If my investigation led me to Mr. Shepherd's name as
3 a possible suspect, then yes, I would have done a photo
4 lineup.
5 Q. In this situation why didn't you use a photo lineup?
6 A. Because I had the co-defendant give me the name of
7 the suspect right out of the chute, within minutes of him
8 being detained. I was asking Mr. Hartman to confirm what I
9 believe I already knew.
10 Q. So if he told you, yes, I recognize this person, or
11 no, I didn't, you would have put Mr. Ward in the line up
12 because you would have believed Mr. Ward would have been
13 lying?
14 A. That would have been my belief, yes.
15 Q. Did Mr. Ward tell you whether he and Mr. Shepherd had
16 used methamphetamine in the vehicle?
17 A. Yes, he had.
18 Q. Did he indicate whether there was any left in the
19 vehicle?
20 A. At the time he told me there was, he had not given me
21 a consent.
22 Q. Since you didn't have consent, what did you do?
23 A. I obtained a search warrant for the vehicle.
24 Q. Did you search the truck?
25 A. Yes, I did.

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1 Q. Where did you find the truck?
2 A. The Homestead's parking lot, parked in the lower
3 southeast corner of the parking lot.
4 Q. Was it as Mr. Ward described to you? What sort of
5 truck did he describe?
6 A. Blue Toyota pickup.
7 Q. With a shell on it?
8 A. Yes.
9 Q. Does this parking lot have any arms that come down to
10 keep the public out?
11 A. No, it does not. It's a public parking lot.
12 Q. In fact, you heard the testimony that Mr. Shepherd
13 and Mr. Ward parked their vehicle there?
14 A. Yes, and then rode their bikes down the golf trail.
15 Q. Upon searching the truck what did you find?
16 A. Narcotics and narcotic paraphernalia.
17 Q. What kind did you find?
18 A. Methamphetamine.
19 Q. Do you have that up there with you?
20 A. I do.
21 Q. Can you pull that out?
22 MR. LOW: Your Honor, these have previously been
23 used. I'll put the new sticker over the old sticker.
24 THE COURT: That would be fine.
25 Q. (BY MR. LOW) Showing you what's been marked as State's

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1 Exhibit numbers 14 and 15, do you recognize those?
2 A. Yes, I do.
3 Q. What are they?
4 A. Containers.
5 Q. First 14.
6 A. 14 is a Tupperware container.
7 Q. I'm sorry, it says "small Tupperware container?"
8 A. Yes, a small plastic white with speckles, with a snap
9 on lid.
10 Q. What is inside of there?
11 A. Methamphetamine.
12 Q. How do you know that?
13 A. The narcotics that were recovered from the vehicle
14 during the search warrant were sent to the Crime Lab, and an
15 analysis was done of those substances.
16 Q. I'll show you State's Exhibit 16. Is that the Crime
17 Lab analysis you received back?
18 A. Yes.
19 Q. Did that confirm methamphetamine in the container?
20 A. There was 450 milligrams of white crystal substance
21 identified as methamphetamine found in that container.
22 Q. How about Exhibit 15; what is that?
23 A. Exhibit Number 15 is an Everest metal container. I
24 believe chewing gum comes in this, with a plastic band or
25 rubber band around it.

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1 Q. What's inside of that?

2 A. Another small -- we call them "teenner bags," very

3 small Ziplock type baggy.

4 Q. What does it contain?

5 A. Methamphetamine was identified in the plastic bag,

6 and in the residue in the glass pipe. Total weight of the

7 white crystal inside the plastic bag inside the container was

8 .15 grams of methamphetamine.

9 MR. LOW: I need to do a little housekeeping. If I

10 could admit Exhibit 12, the key ring.

11 THE COURT: Any objection?

12 MR. SAVAGE: No.

13 THE COURT: It's received.

14 (State's Exhibit No. 12

15 Was received into evidence.)

16 MR. LOW: Move to admit 13.

17 MR. SAVAGE: No objection.

18 THE COURT: It's received.

19 (State's Exhibit No. 13

20 Was received into evidence.)

21 MR. LOW: Move to admit 14.

22 MR. SAVAGE: I have stipulated to the analysis

23 already.

24 THE COURT: It's received.

25 (State's Exhibit No. 14

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1 Was received into evidence.)

2 MR. LOW: I marked Exhibit Number 7 previously, the

3 cell phone, which says, "I love you, Jenna."

4 THE COURT: Any objection?

5 MR. SAVAGE: No.

6 THE COURT: It's received.

7 (State's Exhibit No. 7

8 Was received into evidence.)

9 MR. LOW: Thank you.

10 Q. (BY MR. LOW) Now, you already said when you talked to

11 Mr. Hartman he didn't say anything about what Mr. Ward had told

12 you?

13 A. That's correct.

14 Q. Didn't tell him, "this is the guy?"

15 A. No.

16 Q. When you talked to Mr. Ward, did you tell Mr. Ward

17 anything about what Mr. Hartman may have told you before that

18 point?

19 A. No.

20 Q. So independently Mr. Ward identified Mr. Shepherd as

21 the co-defendant, as the other burglar?

22 A. I didn't understand your question. I'm sorry.

23 Q. Did Mr. Ward identify Mr. Shepherd independent of any

24 information you had?

25 A. Oh yeah.

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1 Q. Did Mr. Hartman identify Mr. Shepherd independent of

2 any information that you already had?

3 A. That's correct.

4 MR. LOW: Nothing further.

5

6 CROSS-EXAMINATION

7 BY MR. SAVAGE:

8 Q. Officer, you've been a police officer how many years?

9 A. 13.

10 Q. And you're POST certified?

11 A. Yes.

12 Q. What is that?

13 A. Police Officers Standards and Training.

14 Q. And they train you to be more efficient, effective,

15 make sure you get the right people. That's what POST does,

16 enforcement training type --

17 A. The basic academy for the State of Utah, Police

18 Academy.

19 Q. And you graduated from there?

20 A. Yes, I did, sir.

21 Q. As part of your POST training, they do teach you all

22 about lineups and photo opportunities, and things -- in other

23 words, identification procedures are part of your training at

24 POST, are they not?

25 A. Yeah, very little. It usually comes in advanced

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1 training after POST.

2 Q. And you've had that training, too?

3 A. Yes, sir.

4 Q. And I'm aware of that because of the other cases in

5 which we've dealt with each other?

6 A. That's correct.

7 Q. There is a reason when you're showing photo lineups

8 to defendants, there's a reason you usually have more than one

9 person; isn't that correct?

10 A. That's correct.

11 Q. What is that reason?

12 A. To give an unbiased opinion or -- what is the word

13 I'm looking for. A nonbiased pick for a victim or witness in

14 a case, to identify a defendant independently of anything

15 other than his own recollection.

16 Q. Well, and didn't you even testify that you will try

17 to find similar photographs so that if you were to show a

18 photo array to a witness, you wouldn't show them a 7-foot tall

19 basketball player and a red headed midget; you would actually

20 go looking for similarities, ages, sizes, things of that

21 nature, because your photo array would be similar to a

22 suspect?

23 A. That's correct.

24 Q. And you have the capacity with the technology to do

25 exactly that?

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1 A. We do on our computer program, yes, sir.
 2 Q. And so if you were going to want to give someone an
 3 unbiased photo array from which to make a choice, you would
 4 not suggest who to pick, correct?
 5 A. Oh, none whatsoever.
 6 Q. You would not suggest that, "for sure, he's one of
 7 these six, so you have to pick one?"
 8 A. None whatsoever.
 9 Q. Wouldn't do that?
 10 A. No.
 11 Q. And you would have gone through your computer and
 12 found similarities to the person whom you believe is the
 13 guilty party and find people who look somewhat like him?
 14 A. As close as possible.
 15 Q. And therefore you're really honing down the witness'
 16 memory, because if there are two similar people, as opposed to
 17 a blond person or the only blond haired person in the room of
 18 six black headed people, you would do that?
 19 A. That's correct.
 20 Q. And you would do that to be fair?
 21 A. That's correct.
 22 Q. And none of that was done in this situation, was it?
 23 A. No, it was not.
 24 Q. As I recall from your prior testimony in this court,
 25 Officer, you said that part of what you were doing is you were

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1 moving quickly?
 2 A. Yes. I had a lot to do.
 3 Q. Not only did you have a lot to do as the case agent
 4 and the supervising of all of the other evidence, you also had
 5 an unknown person out and about.
 6 A. That's correct.
 7 Q. Therefore you took some short cuts?
 8 A. Yes, sir.
 9 Q. And the nature of the one photo that you showed to
 10 Mr. Hartman was the shortcut, was it not?
 11 A. That was to confirm in my mind it was the person I
 12 was trying to apprehend, yes.
 13 Q. And you didn't take the time to get five other people
 14 who looked like Mr. Shepherd and put them down so in fact all
 15 of the safeguards your post training as given you would come
 16 into play?
 17 A. That's correct.
 18 Q. And you didn't do that?
 19 A. That is correct.
 20 Q. When we talk about this sort of thing, we talk about
 21 a one person lineup, or one person show-up, as being unduly
 22 suggestive; isn't that correct?
 23 A. It's possible, yes.
 24 Q. And it is a very real risk, which is why the
 25 standards say, "don't do it that way?"

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1 A. That's correct.
 2 Q. Recalling your preliminary hearing testimony,
 3 Officer, you indicated -- do you have a copy there?
 4 A. I do now.
 5 Q. Go to page 49, line 15. We're talking about
 6 descriptions and so on. And from this, your answer to the
 7 question by Mr. Low is: "You don't know if you thought it was
 8 blond or dark or Mexican or any of those other
 9 characteristics?"
 10 A. Correct.
 11 Q. In other words, a range of people that live in this
 12 community, here or Salt Lake County?
 13 A. That's correct.
 14 Q. And your answer was, "No, I believe Mr. Hartman may
 15 have indicated he had blond hair."
 16 A. "Blondish."
 17 Q. Below that you say, "I believe all I could remember
 18 was blondish, sandy, dishwater blond?"
 19 A. That's correct.
 20 Q. Next question: "As far as tall, short, thin, fat,
 21 anything, did you get into any of that stuff?" And the
 22 answer, of course, is "no." Correct? And line 23, Mr. Low
 23 asked you: "So it wasn't a typical photo lineup where you try
 24 to get similar people matching Mr. Hartman's description?"
 25 And you answer: "No."

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1 A. That is correct.
 2 Q. You were also asked at that time, Officer, about
 3 exactly how many photographs you did show to Mr. Hartman, did
 4 you not? Do you remember that?
 5 A. I believe so. I'm trying to locate --
 6 Q. Page 53, line 7. You previously testified under oath
 7 to the following. And I'm just going paraphrase. Officer you
 8 indicate from your report of June 26 you made contact with the
 9 victim and asked him to come to the SO and look at a picture?
 10 A. That's correct.
 11 Q. And your answer at that time was: "That is correct."
 12 I emphasize, "a picture." And you said that was correct. And
 13 I was concerned about that. And I asked you the next
 14 question. "Is that an accurate statement?" Answer: "Yes, it
 15 is."
 16 A. Uh-huh (affirmative).
 17 Q. And then I asked you: "You heard Mr. Hartman say
 18 earlier today in this hearing that you showed him an array of
 19 pictures. Which is it?" And you said: "I showed him a
 20 picture of -- my recollection, a picture of Mr. Shepherd."
 21 A. That is correct.
 22 Q. And that's what you testified to then?
 23 A. At the prelim, yes.
 24 Q. That you showed him one picture, and one picture
 25 only?

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1 A. That was my belief, yes, sir.
2 Q. Today somehow that has changed?
3 A. Thinking back, I possibly could have showed him a
4 picture of another co-defendant.
5 Q. But back in November?
6 A. That was my belief.
7 Q. When this was fresher in your mind --
8 A. Yes, it was.
9 Q. And some eight months ago, seven, eight, somewhere
10 around there -- do the math with me -- back then it was "a
11 picture," wasn't it?
12 A. That was my belief, yes, sir.
13 Q. In fact, I even asked you: "Are you sure?" And you
14 said, "Yes?"
15 A. Yes, you did.
16 Q. So you were sure in November, when the thing was the
17 hottest thing on the griddle for you?
18 A. That was my recollection, yes, sir.
19 Q. You've been present to hear Mr. Ward testify about
20 all of the meth he had been doing?
21 A. Yes, sir.
22 Q. You were present to hear Mr. Ward testify about meth
23 coming up the canyon, meth at night. You're an experienced
24 officer. Do you also recall Mr. Ward telling you in your
25 interview that he was under the influence of meth at the time

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1 you interviewed him?
2 A. Yes. I asked him that direct question.
3 Q. And you asked him that?
4 A. Yes.
5 Q. And you're trained in this sort of thing, got all of
6 the DRT training I'm aware of?
7 A. I don't have the DRT training, but I have been to the
8 Utah Drug Academy.
9 Q. Okay. So during this episode you're speaking with
10 Mr. Ward, you're interviewing him?
11 A. That is correct.
12 Q. He says he's under the influence of methamphetamines,
13 he tells you that?
14 A. That's correct.
15 Q. And you believed it, didn't you?
16 A. Uh-huh (affirmative).
17 Q. I'm going to bounce around a little here. These are
18 just my notes. I apologize.
19 A. Okay.
20 Q. You interviewed Mr. Shepherd how long afterwards?
21 A. I would have to refer to my notes, Mr. Savage.
22 Q. A matter of days?
23 A. A couple of weeks, I believe. Within a couple of
24 weeks.
25 Q. Did you have any observations of him relating to any

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1 attempts he had made to try to change his appearance?
2 A. No, because I had not known Mr. Shepherd from the
3 past.
4 Q. You have ice cream spoons, maybe, maybe?
5 A. Yeah.
6 Q. You've got testimony here, there, and statements from
7 everybody, that supposedly Mr. Shepherd is running roughshod
8 through the house, picking up everything picking up things,
9 carrying things, stuffing in back packs. Tell me about all of
10 the fingerprints you found?
11 A. I attempted to lift a number of fingerprints from a
12 number of items. That's why when you touch all of this you'll
13 get black. There were, I believe, some partial latent prints
14 submitted to the Crime Lab for analysis, and no legible prints
15 were found.
16 Q. So for the house, the refrigerator, the stereo,
17 computer, the CPU, the television --
18 A. I dusted the CPU, which was --
19 Q. Let me finish my question. That's a list of all of
20 the things that supposedly Mr. Shepherd, according to
21 Mr. Ward, had something to do with. Any fingerprints that
22 relate to Mr. Shepherd?
23 A. That was his testimony, yes.
24 Q. Did you find any fingerprints that you can relate to
25 Mr. Shepherd?

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1 A. I could not.
2 Q. So the norm for that sort of thing, had there been a
3 fingerprint, it would have been somewhat conclusive that
4 Mr. Shepherd was there?
5 A. Uh-huh (affirmative).
6 Q. It wouldn't be possible, unless you believe
7 television stuff, that someone stole Mr. Shepherd's
8 fingerprints. You don't have anything like that, do you?
9 A. No, sir.
10 Q. Mr. Ward has characterized himself and his behavior
11 on the stand as being completely, totally cooperative. He's
12 telling everybody that he's talking to you and telling the
13 truth. You are aware that he told the first officer he spoke
14 with untruths, are you not?
15 A. That is true.
16 Q. When you asked him for permission to search his
17 vehicle, he refused, didn't he?
18 A. He did not have a vehicle, Mr. Savage.
19 Q. That's right --
20 A. Oh, the truck is. He did refuse. I asked for a
21 consent to search.
22 Q. And that's my point. You believe that he was related
23 to that vehicle. You asked him for permission to look in it,
24 and he said, "no.?"
25 A. That's correct.

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1 Q. So he was certainly less than cooperative with you?
2 A. At that point, yes.
3 Q. You spoke with Mr. Shepherd's mother at some point
4 prior to his arrest, did you not?
5 A. That is correct.
6 Q. And did she indicate to you that there were other
7 individuals who were possibly involved in this crime?
8 MR. LOW: Your Honor, I'll object to the hearsay. I
9 don't want the mother's testimony to come through this
10 officer. If she's going to testify, I want the opportunity to
11 cross-examine her as a witness.
12 THE COURT: Isn't that hearsay?
13 MR. SAVAGE: He can certainly say what he's heard any
14 different than any other conversation he's talked about.
15 Mr. Ward told him things, and my client's mother told him
16 things. I'm not offering it for the truth.
17 THE COURT: It's hearsay.
18 MR. SAVAGE: What I'm going to ask is whether he was
19 given alibi witnesses by other people.
20 THE COURT: You can ask him that question.
21 Q. (BY MR. SAVAGE) Were you given the identities of other
22 people who, as possible perpetrators --
23 MR. LOW: Objection --
24 MR. SAVAGE: -- alibi witnesses. What I'm driving
25 at: Did you check out the alibis of people whom identities

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1 were given to you?
2 MR. LOW: I think that Ms. Markus can testify to what
3 she might have told Mr. Winterfon.
4 THE COURT: You can ask him if he did anything in
5 response to the conversations he had with Mr. Shepherd's
6 mother.
7 Q. (BY MR. SAVAGE) Did you have a conversation with
8 Mr. Shepherd's mother?
9 A. Yes, I did.
10 Q. Did you do anything in response to that conversation
11 specifically relating to alibis or anybody else?
12 A. Ms. Markus indicated to me --
13 MR. LOW: Your Honor, I would like the Court to
14 advise the officer only to answer the question.
15 THE COURT: You can't testify as to what she told
16 you.
17 THE WITNESS: No, I did not.
18 Q. (BY MR. SAVAGE) As it relates to these controlled
19 substances, other than Mr. Ward's testimony, do you have any
20 link between all of these controlled substances, the pipe,
21 anything, do you have any link between all of that evidence and
22 Mr. Shepherd, other than Mr. Ward?
23 A. No, sir.
24 Q. No DNA? Nothing? No fingerprints on the pipe?
25 Nothing?

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1 A. No.
2 Q. No identifying marks found on anything in the truck
3 relating to the narcotics you've testified to?
4 A. No, sir.
5 MR. SAVAGE: That's all I have of this witness.
6 THE COURT: Mr. Low, anything?
7 MR. LOW: Yeah.
8
9 REDIRECT EXAMINATION
10 BY MR. LOW:
11 Q. Was it possible to do a line up with the information
12 that you had?
13 A. I could have possibly obtained more information.
14 Q. First you would have to go back and talk to
15 Mr. Hartman and get a full description?
16 A. That's correct.
17 Q. At that point in time your course of the
18 investigation, with the information you did have, could you
19 have done an effective line up?
20 A. Not with the information I had at that time.
21 MR. LOW: Nothing further.
22 >>>
23 RECROSS-EXAMINATION
24 BY MR. SAVAGE:
25 Q. Let me see if I got it. You can make a phone call

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1 and talk to Mr. Hartman. Tell me what more than sandy blond
2 hair?
3 A. Height, weight.
4 Q. You could have done that?
5 A. Yes, sir.
6 Q. And Mr. Hartman has testified he's in possession of
7 all of that information, hasn't he?
8 A. Yes, I believe so.
9 Q. You didn't get it from him?
10 A. No, I did not.
11 MR. SAVAGE: Nothing further.
12 THE COURT: You may step down.
13 Any other witnesses, Mr. Low?
14 MR. LOW: Let me make sure that's all of the
15 evidence.
16 Your Honor, the State will rest at this time.
17 THE COURT: Okay, Mr. Savage, is the defense prepared
18 to call witnesses at this time?
19 MR. SAVAGE: We are, Your Honor. We're ready to go.
20 Because of the method by which this has been going. I'm going
21 to ask for a few minutes. I know folks are waiting in cars.
22 I'm going to go martial them around.
23 THE COURT: Let's take a five minute recess until
24 4:15.
25 (Recess held.)

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1 THE COURT: We'll return to the case of State versus
2 Ron Shepherd. The jury is in the jury box, Mr. Shepherd is
3 present along with counsel and Mr. Low is present for the
4 State. Call your first witness.

5 MR. SAVAGE: We would call Jeremy Duckett.

6 THE COURT: Mr. Duckett, have you previously been
7 sworn?

8 THE WITNESS: Yeah.

9
10 JEREMY KEITH DUCKETT
11 Called by the State, having
12 Been previously sworn, testified as follows:

13
14 DIRECT EXAMINATION

15 BY MR. SAVAGE:

16 Q. Give us your full name.

17 A. Jeremy Keith Duckett.

18 Q. Where do you reside?

19 A. You want an address?

20 Q. Yes.

21 A. 3810 south Redwood Road, West Valley City, 84119.

22 Q. Are you employed?

23 A. Yes.

24 Q. Where are you employed?

25 A. I work for Perfect Register.

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1 Q. What is that?

2 A. A foil stamping and embossing company.

3 Q. Do you know the gentlemen seated to my right, your
4 left?

5 A. Yes.

6 Q. Who is that?

7 A. It's Ron Shepherd.

8 Q. Why do you know who that is?

9 A. I dated his sister for awhile, and he lived with me
10 for an extended period of time.

11 Q. Let's talk about that. For how long did you reside
12 with Mr. Shepherd?

13 A. I would like to say it was between three and four
14 years. I don't know the exact amount of time.

15 Q. Well, what capacity; landlord/tenants, friends,
16 roommates?

17 A. Closer to friends and roommates. Not landlord
18 tenant.

19 Q. Do you remember that address?

20 A. 2600 south 2630 west.

21 Q. Did you happen to run into Mr. Shepherd at any time
22 during the month of June 2002? In other words, the last year
23 last year June?

24 A. Yes.

25 Q. When?

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1 A. Sunday night, between 12:30 and 1:00 o'clock. Sunday
2 night, Monday morning.

3 Q. What is the numerical date?

4 A. June 23rd to the 24th.

5 Q. Where did this happen?

6 A. At the Albertson's on 8400 west and 4500 south.

7 Q. Is that the one that says Westbench Albertson's?

8 A. Yeah.

9 Q. And that is an Albertson's that has what hours as
10 best you know?

11 A. I think they're open 24 hours.

12 Q. You were there between what time?

13 A. 12:30 and 1:00. I don't remember very well, because
14 I hadn't had my car very long, and hadn't figured out how to
15 set the clock.

16 Q. How did you come to contact Mr. Shepherd?

17 A. I was walking out, and he was walking in.

18 Q. In the parking lot?

19 A. Yes.

20 Q. Well lit?

21 A. I don't know how well lit it is.

22 Q. Well enough you knew the person you lived with for
23 three years?

24 A. Yeah. He called out my name, and I acknowledge him
25 and walked over and talked to him.

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1 Q. Any doubt in your mind that this is who you met on
2 June 23rd, 2002 in the Albertson's in Magna?

3 A. None whatsoever.

4 MR. SAVAGE: That's all I have.

5 THE COURT: Mr. Low, cross?

6
7 CROSS-EXAMINATION

8 BY MR. LOW:

9 Q. How long have you been friends with Mr. Shepherd?

10 A. I met him two years before he moved in. Probably
11 five or six years.

12 Q. As of now?

13 A. Yeah. That's approximate.

14 Q. Do you see him very often in that period of time?
15 Maintained a good friendship with him?

16 A. The last year and a half, since I moved out of the
17 house, probably not as much as I would like.

18 Q. How often is that?

19 A. I've probably seen him three or four times since I
20 sold my house and moved.

21 Q. You dated his sister; is that right?

22 A. Yeah.

23 Q. Are you still dating his sister?

24 A. No, we broke up actually. And he was living there
25 two years after we were done.

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1 MR. LOW: Thank you.

2

3 REDIRECT EXAMINATION

4 BY MR. SAVAGE:

5 Q. In regard to who needs to do what, Jeremy, have you

6 ever been contacted by Officer Winterton?

7 A. No.

8 MR. SAVAGE: We would ask the Court to take judicial

9 notice of the alibi witnesses provided, names, telephone

10 numbers, addresses provided to the State of Utah by my office.

11 MR. LOW: I have no objection to Your Honor providing

12 that, as well as the date that's provided.

13 Q. (BY MR. SAVAGE) You've never been contacted by anybody

14 else?

15 A. No. I didn't even get a subpoena. Ron came and gave

16 me a letter and directions and stuff how to get here today.

17 THE COURT: To be real honest with you, I can't find

18 it.

19 MR. SAVAGE: There is a notice of alibi in the file.

20 MR. LOW: I can stipulate to it.

21 MR. SAVAGE: It was within the statutory period, but

22 certainly it's been within the last 25 days.

23 MR. LOW: The State will stipulate we received it on

24 June 10th of this year.

25 THE CLERK: That's about when I filed it.

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1 THE COURT: That's a stipulation that the jury may

2 accept as being agreed to by the parties, that the defense

3 filed Notice of Alibi Witnesses on June the 10th.

4 Q. (BY MR. SAVAGE) Since then you've had no contact with law

5 enforcement?

6 A. No.

7 Q. No one has called you?

8 A. No.

9 Q. Left any messages?

10 A. No.

11 Q. No one came to your work?

12 A. No.

13 Q. Or address?

14 A. No.

15 Q. You're not receiving anything from anyone to testify

16 here today, are you?

17 A. No.

18 Q. Not being paid?

19 A. No.

20 Q. Not getting a deal?

21 A. No.

22 MR. SAVAGE: Nothing else.

23 THE COURT: Anything else, Mr. Low?

24 MR. LOW: No.

25 THE COURT: You may step down.

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1 Next witness.

2 MR. SAVAGE: Thank you, Your Honor. Your Honor, we

3 call Scott Driffill, also on the alibi list.

4 THE COURT: The bailiff will get him.

5 Mr. Driffill, you've previously been sworn?

6 THE WITNESS: Yes, sir.

7 THE COURT: Take the witness stand.

8

9 RYAN SCOTT DRIFFILL

10 Called by the State, having

11 been previously sworn, testified as follows:

12

13 DIRECT EXAMINATION

14 BY MR. SAVAGE:

15 Q. State your full name for the record.

16 A. Ryan Scott Driffill.

17 Q. Where do you reside sir?

18 A. In West Valley.

19 Q. Do you know the gentlemen to my right, your left?

20 A. Yes, I do.

21 Q. Who is that?

22 A. Ron Shepherd.

23 Q. How do you know Ron Shepherd?

24 A. Through mutual acquaintances.

25 Q. Did there come a time in June, specifically June 23,

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1 that you attempted to contact Mr. Shepherd by phone?

2 A. Yes.

3 Q. And why were you doing that?

4 A. Had to return --

5 Q. Go ahead.

6 A. To return the message that I had received.

7 Q. And who told you that you had received a message?

8 A. My parents.

9 Q. And so you didn't talk to the original person who had

10 called?

11 A. No.

12 Q. Who did they tell you had called?

13 A. Just Ron.

14 Q. And you know more than one Ron?

15 A. Yes.

16 Q. But you elected to call this Ron?

17 A. Yes.

18 Q. Tell me when you called.

19 A. It was around 10:00 o'clock.

20 Q. On June 23rd?

21 A. June 23rd.

22 Q. What happened when the phone rang?

23 A. First I tried his cell phone.

24 Q. Is that the first number you called, the cell phone?

25 A. Yes.

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1 Q. And you had Mr. Shepherd's cell phone number?

2 A. At the time I did.

3 Q. And had he given that to you?

4 A. Yes.

5 Q. Had you called it before?

6 A. Once or twice.

7 Q. And had Mr. Shepherd answered?

8 A. Uh-huh (affirmative).

9 Q. You need to answer yes or no?

10 A. Yes, sir.

11 Q. On this evening did you call that same number you had

12 called previously?

13 A. Correct.

14 Q. What happened?

15 A. I dialed the number and somebody picked up. And it

16 was like the transmission -- we got cut off.

17 Q. So did you attempt to call back to that same number?

18 A. No, I didn't.

19 Q. What did you do next?

20 A. Tried his home phone.

21 Q. The home phone is a land-line phone?

22 A. Correct.

23 Q. And you have that number?

24 A. Correct.

25 Q. And it's not a cell phone number?

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1 A. Correct.

2 Q. And when you called that land-line number, what

3 happened?

4 A. Ron picked up the phone.

5 Q. Ron Shepherd?

6 A. Uh-huh (affirmative).

7 Q. And that phone rings where; in his home?

8 A. Yes.

9 Q. Where is that home?

10 A. In West Valley.

11 Q. And you've been there?

12 A. Yes.

13 Q. And Mr. Shepherd personally answered the phone there?

14 A. Yes.

15 Q. Did you have a conversation with him about that

16 evening?

17 A. Brief.

18 Q. Did you ask him why he hadn't talked on his cell

19 phone?

20 A. I did.

21 Q. You got into a conversation about that?

22 A. I did.

23 Q. What was said and by whom?

24 MR. LOW: I'll object to hearsay. Mr. Shepherd isn't

25 going to testify.

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1 MR. SAVAGE: He can testify what he heard.

2 THE COURT: It's hearsay, a statement made outside

3 the presence of the jury that's going to be taken for the

4 truth of the matter asserted.

5 MR. SAVAGE: If he heard Mr. Shepherd speak --

6 MR. LOW: He can't testify to that.

7 THE COURT: He's testified -- it is your testimony

8 that you recognized the voice of Mr. Shepherd.

9 THE WITNESS: Yes.

10 MR. SAVAGE: That's fine. Thank you. No further

11 questions.

12

13 CROSS-EXAMINATION

14 BY MR. LOW:

15 Q. Hi, I'm Thomas Lowe, the prosecutor.

16 A. Hi.

17 Q. Nice to meet you.

18 A. You too.

19 Q. You testified you knew Ron through mutual

20 acquaintances. Is Dustin Ward one of those mutual

21 acquaintances?

22 A. Yes.

23 Q. And what is your occupation?

24 A. I'm currently unemployed right now, at the moment.

25 Q. Have you been unemployed for awhile?

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1 A. Three months.

2 Q. Have you moved in the last year or so?

3 A. No.

4 Q. Do you live with your mother now?

5 A. I do.

6 Q. Did you live with your mother back then?

7 A. Yes.

8 Q. Does your mother sell Tupperware?

9 A. Yes.

10 Q. Is that an item of Tupperware?

11 A. Yes.

12 Q. I should refer to it by its Exhibit Number, State's

13 Exhibit Number 14.

14 Do you recognize that kind of article of Tupperware?

15 A. Yes, I do.

16 Q. Your mom sales that kind of Tupperware?

17 A. Uh-huh (affirmative).

18 Q. Are those kinds of Tupperware around your house then?

19 A. They are.

20 Q. On this particular night, June 23rd, we're talking a

21 Sunday. Do you remember that day?

22 A. Bits and pieces I do.

23 Q. How do you remember, for example, that you called Ron

24 that particular day?

25 A. Because I was having a relative that was suppose to

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1 be coming into town on that day. So that's why I remember it.
 2 Q. What relative was that?
 3 A. A cousin, Jason, of mine.
 4 Q. On that particular day you saw Dustin Ward as well,
 5 didn't you?
 6 A. I don't recall.
 7 Q. You saw Ron Shepherd before you talked to him by
 8 phone?
 9 A. Not that I remember on Sunday.
 10 Q. Isn't it true that Ron Shepherd and Dustin Ward came
 11 together over to your home that evening to borrow your scales
 12 to weigh some methamphetamine?
 13 A. No.
 14 Q. Didn't you volunteer that piece of Tupperware from
 15 your mother's stash of Tupperware --
 16 A. No, sir.
 17 Q. -- to Mr. Ward?
 18 A. No, sir. It's around in my basement where I
 19 frequent, so they could have picked it up whenever they was at
 20 my place of residence.
 21 Q. Now, I'm not saying that you sold methamphetamine.
 22 I'm just saying that you weighed methamphetamine.
 23 A. No.
 24 Q. After the methamphetamine was weighed, didn't you go
 25 some to use as payment?

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1 A. Nope.
 2 Q. When did Mr. Shepherd talk to you about coming here
 3 to testify today?
 4 MR. SAVAGE: I'm sorry, Mr. Low, could you repeat
 5 that?
 6 Q. (BY MR. LOW) When did Mr. Shepherd talk to you about
 7 coming here today to testify?
 8 A. I don't recall the exact date.
 9 Q. Are we talking a week ago, two weeks ago, a month
 10 ago? You don't need to tell me the exact date. That's fine.
 11 A. Maybe a week to two weeks. Maybe.
 12 Q. Until that point he was asking you to try to remember
 13 what happened a year ago?
 14 A. Uh-huh (affirmative).
 15 Q. Did you consult any telephone records to help you to
 16 ascertain the date you called Mr. Shepherd at his home?
 17 A. No.
 18 Q. You've called Mr. Shepherd at his home more than
 19 once?
 20 A. Yes.
 21 Q. And called him more than once on his cell phone?
 22 A. Correct.
 23 Q. How long have you known Mr. Shepherd?
 24 A. Three or four years, maybe.
 25 Q. And you would have called him numerous times during

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1 that period of time?
 2 A. Correct.
 3 Q. And he would have called you numerous times during
 4 that period of time?
 5 A. Correct.
 6 MR. LOW: Nothing further.
 7
 8 REDIRECT EXAMINATION
 9 BY MR. SAVAGE:
 10 Q. This Tupperware Mr. Low approached you with, is it
 11 marked in some way? Is there any kind of ownership marking,
 12 or identify, or stamps or anything?
 13 A. Not that I'm aware of. None of my personal, none of
 14 my mother's personal.
 15 Q. That's my point. They sell this stuff a lot of
 16 places?
 17 A. Yes.
 18 Q. Do they sell it in stores?
 19 A. No.
 20 Q. They sell it with other Tupperware people?
 21 A. Correct.
 22 Q. And your mother does that, I'm assuming, sells it,
 23 makes a living or some level of living selling this to all
 24 kinds of people, correct?
 25 A. Correct.

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1 Q. All of those people would have access to Tupperware,
 2 correct?
 3 A. Correct.
 4 Q. So anybody could own this, correct?
 5 A. Yes.
 6 Q. So there's something that shows an ownership of those
 7 particular pieces of Tupperware?
 8 A. No, it's just general Tupperware.
 9 MR. SAVAGE: Thank you.
 10 MR. LOW: Nothing more.
 11 THE COURT: You may step down.
 12 MR. SAVAGE: Your Honor, we would call Connie Markus.
 13 THE COURT: Okay, you've been previously sworn. Come
 14 up to the witness stand. Just have a seat right there.
 15
 16 CONNIE LYNN MARKUS
 17 Called by the State, having
 18 Been previously sworn, testified as follows:
 19
 20 DIRECT EXAMINATION
 21 BY MR. SAVAGE:
 22 Q. Would you lean into the microphone so everybody can
 23 hear you. And tell us your full name.
 24 A. Okay. I don't see a microphone, though.
 25 THE COURT: It's that thing on the book there.

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1 THE WITNESS: Okay, this thing.
2 My name is Connie Lynn Markus.
3 Q. (BY MR. SAVAGE) Where do you live?
4 A. West Valley.
5 Q. Give me an address?
6 A. 3822 south 6575 west.
7 Q. And are you employed?
8 A. No.
9 Q. Why not?
10 A. I'm disabled.
11 Q. And the reason is what? What's your disability?
12 A. I had a brain tumor.
13 Q. Do you know the gentleman sitting to my right, your
14 left? My right, your left?
15 A. Yes.
16 Q. Who is that?
17 A. My son.
18 Q. And his name is what?
19 A. Ronald Dennis Shepherd.
20 Q. Mr. Shepherd is accused of a crime which requires
21 that he physically would have been in this county, according
22 to prior testimony, on June 23 and 24 of the year 2002. Do
23 you have any personal knowledge of your son's whereabouts on
24 those days?
25 A. Yes.

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1 Q. And what is that?
2 A. He was at my house on those days.
3 Q. Doing what?
4 A. Well, we had a barbecue.
5 Q. And the 23rd was a Sunday; isn't that correct?
6 A. That's correct.
7 Q. And Mr. Shepherd, your son, was at your home for the
8 barbecue?
9 A. Yes.
10 Q. And when did this start?
11 A. It was around 10:30, I think, 11:00. They were late,
12 so...
13 Q. Is that when it started, the barbecue?
14 A. Uh-huh (affirmative).
15 Q. When did people start arriving for the barbecue?
16 A. Ronald and Jen came around 10:30.
17 Q. Who is Jen?
18 A. His girlfriend.
19 Q. So they were there at your home. Who else was there?
20 A. Then my daughter and her boyfriend came right around
21 11:00.
22 Q. And during this period of time did Ron ever disappear
23 from this area, in terms of a timeframe long enough to drive
24 to Wasatch County -- which you have now done today -- and
25 drive back?

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1 A. No.
2 Q. How long did this go on?
3 A. Until about, say 11:30, around in that area, because
4 we just -- 11:30ish.
5 Q. You indicated your son was with his girlfriend, Jen.
6 A. Uh-huh (affirmative).
7 Q. Did they arrive together?
8 A. Uh-huh (affirmative).
9 Q. And at some point did they ever leave?
10 A. Ron left to go get some beer.
11 Q. Well, and where do you live in relation to Magna?
12 A. Really close. There's just 72 is the deadline, or
13 borderline.
14 Q. 72 what?
15 A. 7200 west.
16 Q. And so your son left?
17 A. Uh-huh (affirmative).
18 Q. And did he come back?
19 A. Yeah, he came back.
20 Q. What did he come back with?
21 A. A six pack of beer.
22 Q. He didn't have it when he left, though?
23 A. No, uh, uh.
24 Q. Well, so he came back. Once he was back how long was
25 he there?

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1 A. They didn't leave until 1:30, 2:00 in the morning.
2 Q. And when he left, with whom did he leave?
3 A. With Jen -- well, no, he did not leave with Jen then.
4 I'm sorry. They went downstairs, and then she left around
5 2:00, but he didn't leave with her.
6 Q. She left alone?
7 A. Yes.
8 Q. This was around 2:00 o'clock in the morning?
9 A. Around 2:00.
10 Q. On June 24th, which would have been Monday?
11 A. Monday, yes.
12 Q. Do you know Dustin Ward?
13 A. Uh-huh (affirmative).
14 Q. How do you know Dustin Ward?
15 A. He's Ron's friend.
16 Q. Please forgive this question.
17 A. Okay.
18 Q. Have you and Mr. Ward ever been intimate?
19 A. No.
20 Q. Do you understand what I mean by that?
21 A. Like sexually intimate?
22 Q. Yeah.
23 A. No.
24 Q. You're absolutely sure?
25 A. I'm positive.

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1 Q So should Mr Ward have testified to facts contrary
2 to what you just said would he be a liar?
3 A He would be a liar
4 MR SAVAGE That's all I have for this lady
5 THE COURT Mr Low, cross examination
6
7 CROSS-EXAMINATION
8 BY MR LOW
9 Q My name is Thomas Lowe I'm the prosecutor It's
10 nice to meet you
11 A You, too
12 Q You indicated that Mr Shepherd was with you from
13 10 30 to 11 00 that night?
14 A Uh-huh (affirmative)
15 Q The barbecue started 10 30 and ended 11 30?
16 A Basically The time period I can't recall for sure,
17 because I don't recall that exact time period
18 Q That was a long time ago?
19 A Yeah It's been a year ago
20 Q Do you recall what you had to eat that night at the
21 barbecue?
22 A Hamburgers
23 Q Any salads?
24 A I don't recall
25 Q Who was all there?

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1 A My daughter, her boyfriend, Jen and Ron
2 Q Who was your daughter's boyfriend?
3 A Damien
4 Q Well, and Ron's girlfriend and you?
5 A Yeah
6 Q Do you recall any type of conversation, or what was
7 talked about that night?
8 A The moon
9 Q Anything else?
10 A I can't remember any outstanding thing, no
11 Q It was a pretty plain barbecue?
12 A Uh-huh (affirmative)
13 Q Nothing out of the ordinary?
14 A No
15 Q One out of dozens of barbecues you've had?
16 A No I haven't had dozens
17 Q Are barbecues a rare thing for you?
18 A No, not rare, but not dozens They're not rare, but
19 not frequent
20 Q What makes you think this particular barbecue was on
21 the 23rd?
22 A It was the moon that night
23 Q What about the moon that night?
24 A It was just beautiful
25 Q What about it was beautiful?

CERTIFIED COURT TRANSCRIPT

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1 A It was full
2 Q It was a full moon and it was beautiful?
3 A Yes
4 Q Were you high on drugs that night?
5 A I don't do drugs
6 Q Can I ask you, you know Dustin Ward?
7 A Yes
8 Q And back not now perhaps but back a year ago you
9 were fond of Mr Ward?
10 A What do you mean fond
11 Q I'm not going where Mr Savage went You cared about
12 him, and he was a friend of the family?
13 A He was a friend, yes
14 Q When Mr Ward broke up with Trish -- you know who
15 Trish is?
16 A Yes
17 Q And you know that Ron and Trish started going out for
18 a little while, not very long, but a little while?
19 A I don't know as you would call it "going out"
20 Q But going together kind of a little bit?
21 A Yeah, maybe a little bit They watched a movie is
22 what I know
23 Q And you know that hurt Dustin's feelings?
24 A Uh-huh (affirmative)
25 Q You talked to Mr Ward about that, didn't you?

CERTIFIED COURT TRANSCRIPT

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1 A I don't recall talking to him about that
2 Q You helped Mr Ward get over his feelings of
3 bitterness and anger towards Mr Shepherd, your son?
4 A No I don't remember that
5 Q So you never talked to Mr Ward about Trish and your
6 son?
7 A The only thing I talked to him about is when he told
8 me he followed them with a gun, and he told me he was going to
9 shoot them
10 Q He talked to you about that?
11 A Yes he did
12 Q Did you talk to him about those feelings?
13 A I asked him, "Are you crazy?" And he was going "I
14 was going to shoot them" And I was going, "Dustin, you can't
15 do that" Something to that respect
16 Q Were you able to talk him out of being angry, at
17 least as far as violent --
18 A No, not at that point in time I think he was still
19 angry I think maybe he had more of his mind about him, but
20 still angry
21 Q On this particular night, back to June 23rd, at least
22 as far as that goes, you were still fond of Mr Ward at that
23 point?
24 A I really don't care for the word "fond"
25 Q Still a friend of the family?

CERTIFIED COURT TRANSCRIPT

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4TH DISTRICT COURT
STATE OF UTAH
WASATCH COUNTY

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IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR WASATCH COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

VS.

RON DENNIS SHEPHERD,

Defendant.

ORIGINAL

CASE NO. 021500129

JURY TRIAL

VOLUME 2

BEFORE THE HONORABLE DONALD J. EYRE, JR.

FOURTH DISTRICT COURT

125 NORTH 100 WEST

PROVO, UTAH 84601

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

JULY 1, 2003

Reported by: Creed H. Barker, CSR, RPR, CRR

FILED
UTAH APPELLATE COURTS

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3 versus Ron Dennis Shepherd. The jury is present in the jury
 4 box. Mr. Shepherd is present with his attorney, Mr. Savage.
 5 Mr. Low is here on behalf of the State of Utah.
 6 Mr. Savage, call your next witness.
 7 MR. SAVAGE: Mr. Low and I have been careful about
 8 anyone being present in the courtroom during testimony. The
 9 record should reflect, we have this lady, as I understand it,
 10 is Dustin Ward's mother who is here and has been present
 11 throughout. And also we have a potential witness seated in
 12 the blue shirt, who should be excluded. He has been
 13 subpoenaed by the State, but since we're going to have other
 14 testimony, that would be an issue. Thank you.
 15 THE COURT: All right, thank you.
 16 MR. SAVAGE: Your Honor, we would call Jennifer
 17 Duncan at this time.
 18 THE COURT: Okay, Ms. Duncan, come forward. Had you
 19 been sworn yesterday?
 20 THE WITNESS: Yes.
 21 THE COURT: Come up and take the witness stand then.
 22
 23 JENNIFER DUNCAN
 24 Called by the State, having been previously
 25 Sworn, was examined and testified as follows:

CERTIFIED COURT TRANSCRIPT

5

3 the truth, the whole truth and nothing but the truth, so help
 4 you God?
 5 THE WITNESS: Yes.
 6
 7 DIRECT EXAMINATION
 8 BY MR. SAVAGE:
 9 Q. Morning.
 10 A. Good morning.
 11 Q. Sorry about your car trouble coming up the canyon.
 12 Give the jury your full name, if you will.
 13 A. My name is Jennifer Lynn Duncan.
 14 Q. Where do you reside?
 15 A. West Valley City, Utah.
 16 Q. Why don't you lean in a little to the amplification.
 17 A. West Valley City, Utah.
 18 Q. What do you do for a living?
 19 A. I'm a supervisor at a call center.
 20 Q. Now, you've been here yesterday and today?
 21 A. Uh-huh (affirmative).
 22 Q. You were sworn yesterday as a witness?
 23 A. Right.
 24 Q. I want to make sure, since there's been an overnight
 25 period of time, you haven't discussed your testimony with

CERTIFIED COURT TRANSCRIPT

6

1 anyone. Have you?
 2 A. No, I haven't.
 3 Q. And specifically you haven't discussed it with the
 4 gentlemen sitting next to me?
 5 A. No.
 6 Q. You knew you were forbidden from doing that? The
 7 court told you?
 8 A. Yes, I'm aware.
 9 Q. Do you know this gentlemen sitting next to me?
 10 A. Yes, I do.
 11 Q. Who is it, and why do you know him?
 12 A. His name is Ron Shepherd, and he's my boyfriend.
 13 Q. How long has he been your boyfriend?
 14 A. About two years.
 15 Q. Where does Mr. Shepherd reside now?
 16 A. At his mother's house in West Valley City.
 17 Q. Is that Connie's house?
 18 A. Yes.
 19 Q. Has Mr. Shepherd resided there for awhile?
 20 A. Yes.
 21 Q. To the best of your knowledge was Mr. Shepherd
 22 residing there on June 23rd of 2002?
 23 A. Yes, he was.
 24 Q. Were you with him, Mr. Shepherd, on July 23rd and
 25 24th of 2002?

CERTIFIED COURT TRANSCRIPT

7

1 A. July 23rd --
 2 Q. June, sorry. Thank you.
 3 A. Yes, we were together.
 4 Q. When I say with him, tell me where you were during
 5 the day of June 23rd to start with.
 6 A. Okay. About -- first of all, to start with, the
 7 first time I seen him on June 23rd was about 7:00 p.m. I went
 8 to his house.
 9 Q. And what did you do?
 10 A. Picked him up. We were later suppose to have a
 11 barbecue. So I went and got him and went to the store and a
 12 couple places.
 13 Q. I need you to slow down and speak up. Not only is he
 14 recording it, but these folks need to hear it.
 15 A. Okay.
 16 Q. So on June 23rd you saw him first at what time?
 17 A. 7:00 p.m.
 18 Q. And where was he?
 19 A. At his house, Connie's.
 20 Q. And you drove there?
 21 A. Yes.
 22 Q. You don't live there?
 23 A. No, I don't.
 24 Q. You drove there to the house, and then you and
 25 Mr. Shepherd did what?

CERTIFIED COURT TRANSCRIPT

8

3 me about that.

4 A. His mother had planned a barbecue for the evening,

5 Sunday evening. And we had the barbecue later that evening,

6 when we came back about 9:00 o'clock. About 9:00.

7 Q. Well, so if someone were to say that Ron came over to

8 the barbecue, actually Ron lived where the barbecue happened;

9 is that correct?

10 A. Correct.

11 Q. So he would actually be returning to the barbecue?

12 A. Right.

13 Q. And how long did the barbecue go on?

14 A. Well --

15 Q. The best you remember.

16 A. Probably -- well, I left at 1:30. We stopped eating

17 about 11:30, but I didn't go home until 1:30 in the morning,

18 around there, 2:00.

19 Q. Where was Mr. Shepherd when you went home?

20 A. Sleeping. He fell asleep in his bed.

21 Q. This house that we're talking about, is it a large

22 house?

23 A. Just a normal size house.

24 Q. Upstairs, downstairs?

25 A. Uh-huh (affirmative).

CERTIFIED COURT TRANSCRIPT

9

3 Q. So your testimony is, before you left, Mr. Shepherd

4 was downstairs asleep?

5 A. Yes, he was.

6 Q. And then you took off?

7 A. Uh-huh (affirmative).

8 Q. Last time you actually saw him would have been

9 approximately what time?

10 A. 1:30, 2:00 in the morning on the 24th.

11 Q. During the time of this barbecue, or even before,

12 when you first saw him -- at approximately 7:00 o'clock did

13 you say?

14 A. Uh-huh (affirmative).

15 Q. Was he ever out of your sight long enough to get in a

16 car, his car or anybody else's car, to drive to Midway and

17 drive back to where he lived?

18 A. Absolutely not.

19 Q. During the course of this evening, you have already

20 testified the two of you left and went to the Radio Shack.

21 During the course of the evening did the two of you leave and

22 go anywhere else?

23 A. Yes. We left and went to Albertson's to buy some

24 beer.

25 Q. Where is Albertson's?

CERTIFIED COURT TRANSCRIPT

10

1 A. In Magna, about 2 miles from our house.

2 Q. From which house?

3 A. His house. We live in the same neighborhood, so --

4 yeah, his house, about 2 miles from his house.

5 Q. Why did you go to Albertson's at that hour of the

6 evening?

7 A. Because I wanted to get some beer.

8 Q. Are you aware they're open, closed -- is this where

9 you always shop?

10 A. Yes, I always shop at the Albertson's in Magna.

11 Q. So that occurred, you went there, made a purchase and

12 went somewhere?

13 A. Yes.

14 Q. Where did you go after you made the purchase?

15 A. Straight back to his house, his mother's house.

16 Q. I'm going to show you something --

17 MR. SAVAGE: May I approach the witness?

18 THE COURT: You may.

19 Q. (BY MR. SAVAGE) That says Exhibit 17 on this.

20 A. Uh-huh (affirmative).

21 Q. What is it?

22 A. A cell phone.

23 Q. Whose cell phone?

24 A. Ron's cell phone, I believe.

25 Q. Take a look at it. Somebody tried to turn it on

CERTIFIED COURT TRANSCRIPT

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1 already and it didn't work, so don't bother, unless you want

2 to try again.

3 A. That's okay.

4 Q. Is there something special about that cell phone?

5 A. I bought it.

6 Q. What does it do when it turns on; anything special?

7 A. It says, "I love you, Jen." Something like that.

8 Q. You, being Jen? That's your nickname?

9 A. Yeah.

10 Q. You've seen that cell phone before?

11 A. Yes.

12 Q. Have you seen that before?

13 A. Ron use to carry it.

14 Q. Is there anything that use to go with that cell

15 phone?

16 A. Keys. A key ring that I bought said "Ron" on it.

17 Q. When is the last time that you saw that cell phone

18 that Ron had?

19 A. Probably the day before the barbeque.

20 Q. And so that would take us up to the time that

21 approximately -- of the 23rd, somewhere right in that general

22 area?

23 A. Uh-huh (affirmative).

24 Q. Do you know where it went after that?

25 A. Well Dustin had taken the phone, is what I assumed --

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12

2 call to corroborate your story?

3 A There really wasn't any other people

4 Q You didn't tell him about Albertson's, did you?

5 A No, I didn't

6 Q Mr Shepherd asked you to call Sergeant Winterton

7 back and convey that message?

8 A Uh-huh (affirmative)

9 Q Did you convey that message?

10 A Yes, I did

11 Q As to the Albertson's, how do you recall specifically

12 that it was that night?

13 A How do I recall?

14 Q Yeah

15 A Because at the barbecue I wanted to get some beer, to

16 drink some beer That's how I recall

17 Q There's another reason you recall, isn't there?

18 A Maybe seeing his old landlord there

19 Q As far as making it that specific date, and knowing

20 it was that specific date that you went to Albertson's,

21 anything else that helps you recall that?

22 A The fact that Ron purchased beer I mean he had --

23 Q Did you save any memento or record of that?

24 MR SAVAGE Objection May we approach?

25 (Bench conference held)

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21

2 JUROR Your Honor, some of us are having trouble

3 hearing the witness

4 THE COURT Okay, could you speak up Not that

5 microphone right there It's this one on the book

6 JUROR Thank you

7 Q (BY MR LOW) I'm sorry Was there any sort of memento

8 that you saved of that particular purchase that you were able

9 to remember that it happened on that date?

10 A A receipt

11 Q And you were the one that saved that receipt; is that

12 right?

13 A Yeah, I save every receipt I have Always have saved

14 receipts

15 Q If you'll forgive me I don't have the original

16 Would you have the original of that receipt?

17 A No, I don't

18 Q Would this be an accurate copy of that receipt,

19 that's State's Exhibit 18?

20 A I don't know I gave the receipt to Mr Savage

21 Q So he provided that to us Does that look pretty

22 much like the receipt that you provided?

23 A Yeah, somewhat

24 MR SAVAGE Your Honor, may we approach again?

25 THE COURT Yes

(Bench conference held)

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1 THE COURT Members of the jury, there's a legal

2 matter we need to discuss outside of your presence If you

3 would go with the bailiff into the jury room, once we've made

4 a determination on that legal matter, then we'll have you

5 return

6 (Jury exited courtroom)

7 THE COURT The record may reflect the jury has left

8 the courtroom Mr Savage, you desire to make an objection?

9 MR SAVAGE I do

10 MR LOW If the witness could also be excused for

11 this I don't know exactly what he plans on saying, but there

12 might be cues or assistance

13 THE COURT If you'll go out in the foyer, then we'll

14 call you when we're ready

15 THE WITNESS Okay

16 (Witness exited courtroom)

17 MR SAVAGE Your Honor, I think this is a very

18 technical point, and I would like to make it in the following

19 way The history of this, as the Court is aware, we provided

20 alibi witnesses to Mr Low In the course of that, I received

21 a document, which I courtesy copied to Mr Low, which had to

22 do with Albertson's During that period of time Mr Low's

23 investigator, Officer Winterton and I, both separately and

24 independently interviewed the assistant, now manager -- he was

25 the assistant, at the time, of Albertson's For whatever

CERTIFIED COURT TRANSCRIPT

23

1 reason, there are enough problems with that receipt, that some

2 can be explained, and some cannot be explained, that we've

3 elected not to introduce that receipt because of the questions

4 that it could raise with the jury, the printed document that

5 says "Albertson's" on it If we do not introduce that,

6 Mr Low is attempting to introduce it and accuse our witness

7 of fraud, for a piece of evidence she is not introducing If

8 he wants to introduce it, fine But what he's saying here is

9 he's going to confront her, with a document we are not

10 introducing as evidence to prove she is somehow fraudulently

11 testifying to the document, which is not being offered in her

12 testimony And that would allow him to bootstrap, and then

13 even rebut her testimony on a document he, himself, has

14 introduced

15 So if she were to testify to that document, I think

16 she's fair game to whatever But if she's given a document to

17 me, and I've given it to Mr Low, and not introduced it, for

18 him to introduce it in front of the jury without establishing

19 its validity, would allow him to put on the witness, put on

20 his own testimony, impeach the testimony he's asked for, and

21 bring a rebuttal witness to testify against, again, the

22 document that he has introduced He's asking her to vouch for

23 something we're not asking her to vouch for, and I think that

24 would be inappropriate

25 THE COURT Your response, Mr Low?

CERTIFIED COURT TRANSCRIPT

24

1 you are aware of the truth, the whole truth and nothing but the truth, so help
2 the truth, the whole truth and nothing but the truth, so help
3 you God?
4 THE WITNESS: Yes, ma'am.
5 THE COURT: Have a seat right up here.
6 MR. SAVAGE: While they're doing that, perhaps
7 Mr. Low and I could talk with you for a minute.
8 THE COURT: Mr. Low?
9 (Bench conference held.)
10 MR. SAVAGE: Your Honor, perhaps we could explain
11 what we're doing here.
12 THE COURT: Mr. Savage has the original of the
13 receipt we're going to discuss, and we're going to substitute
14 the original for what we have received as Exhibit 18.
15 MR. SAVAGE: So the photocopy that my office provided
16 to Mr. Low can be substituted by the original, which we agree
17 to have the number changed.
18 MR. LOW: I'll put it on the back.
19 MR. SAVAGE: That's fine.
20
21 DIRECT EXAMINATION
22 BY MR. LOW:
23 Q. Please state your name.
24 A. Joshua Mark Christensen.
25 Q. By whom are you employed?

CERTIFIED COURT TRANSCRIPT

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2 Q. What store specifically are you assigned to?
3 A. Store 032 in Magna, Utah.
4 Q. You've been approached, I guess recently, by both an
5 officer for the State and counsel for the defendant recently
6 regarding a receipt?
7 A. Yes.
8 Q. You're familiar with that receipt now?
9 A. Yes.
10 Q. Many of us are not familiar with how receipts are
11 printed out, I guess.
12 A. Okay.
13 Q. What is your job at Albertson's?
14 A. Assistant Manager.
15 MR. LOW: If I might, Your Honor, turn off the
16 lights?
17 THE COURT: Yes.
18 Q. (BY MR. LOW) That's still going to be hard to see.
19 MR. SAVAGE: I'm wondering, Your Honor, the overhead
20 is right here.
21 THE COURT: Can the jury read that now?
22 MR. LOW: I was able to zoom. I couldn't find it.
23 MR. SAVAGE: We have some yeses and nos over here.
24 Q. (BY MR. LOW) If you could come down over here,
25 Mr. Christensen. Let's explain these numbers on the top,

CERTIFIED COURT TRANSCRIPT

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1 first. The first number along the top says 6/23/02.
2 A. That would be the dated.
3 Q. What is the next number?
4 A. The time, military time.
5 Q. 11:49 p.m.?
6 A. 11:49 p.m.
7 Q. That prints out on every receipt?
8 A. Yes.
9 Q. Next number?
10 A. Store number, 032.
11 Q. Is that the store you work at?
12 A. Yes.
13 Q. Located in Magna?
14 A. Yes.
15 Q. Next to number "00" what does that refer to?
16 A. That would be the check stand number which the
17 receipt came from.
18 Q. Do you have in your store any check stands assigned
19 "00?"
20 A. No.
21 Q. Back a year ago on June 23rd of 2002 did you have any
22 checkstands assigned the number "00?"
23 A. No, sir.
24 Q. What numbers did you have assigned?
25 A. One through eight, 81, 61 and I believe 51.

CERTIFIED COURT TRANSCRIPT

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1 Q. I'll mark this as State's Exhibit 15. Is this a
2 computer printout marked as State's Exhibit 19?
3 THE COURT: It would be 20.
4 MR. LOW: I'm sorry.
5 MR. SAVAGE: Could we approach on taking a peek at
6 these exhibits?
7 THE COURT: Sure.
8 (Bench conference held.)
9 THE COURT: Members of the jury, we're going to take
10 our morning recess at this time. We'll be in recess until
11 10:40. That's 15 minutes.
12 (Jury exited courtroom)
13 THE COURT: The record may reflect that the jury has
14 left the courtroom.
15 During this 15 minute period of time, Mr. Low, I'll
16 require, if there's any document you intend on using with
17 Mr. Christensen as a witness, that you provide Mr. Savage an
18 opportunity to review them. I understand that this is a
19 rebuttal witness, and that you just learned recently. I find
20 it would be in the interests of justice that Mr. Savage be
21 allowed to review them prior to your using them with
22 Mr. Christensen.
23 MR. LOW: So the record is clear, I informed
24 Mr. Savage on Friday that Mr. Winterton had obtained some
25 receipts. And Mr. Savage informed me he had also obtained

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2 MR. SAVAGE: The point is, I'm not under an
3 obligation to provide to Mr. Low -- because there's not a
4 discovery request -- things I've looked at with
5 Mr. Christensen. If they're going to introduce a witness --
6 it's his witness -- before the witness testifies -- the fact
7 they have that evidence, requires them to disclose it to me
8 Understand why they got our receipt: One, was an abundance of
9 caution, and one a courtesy to Mr. Low. I'm sure they got
10 those things. But there's been nothing that's been provided
11 Discovery is an ongoing obligation to allow me to see it other
12 than the same time the jury sees it
13 THE COURT: That's why I'm allowing you an
14 opportunity right now.
15 (Recess held.)
16 THE COURT: We'll return to the case of State of Utah
17 versus Ron Shepherd. The jury is present. You may continue
18 your examination of Mr. Christensen, Mr. Low.
19 MR. LOW: If the jury has any problems, I have no
20 problem with them coming closer. I don't know what the Court
21 would like to do about that.
22 THE COURT: Can everyone see?
23 MR. LOW: Thank you, Judge.
24 Q. (BY MR. LOW) Okay, we're back. If we could just summarize
25 this, we've got the date, the time, the store number, that is

CERTIFIED COURT TRANSCRIPT

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2 A. Yes.
3 Q. We were talking about that. Slowly now, could you
4 tell the jury what check stand numbers you did have.
5 A. We have eight check stands in the store. So we label
6 those 1 through 8, starting at the front of the store is 1
7 through 8, and then we go on and we have a customer service,
8 video and pharmacy registers. We label them. 81 would be the
9 customer service booth. 61 would be the video and 51, I
10 believe on the pharmacy. I'm not sure. That's actually 61
11 and not 51 that's the pharmacy.
12 Q. 81 is the booth. What would be the booth?
13 A. Where we cash checks.
14 Q. 51 is what?
15 A. Where we rent videos.
16 Q. 61 is what?
17 A. Pharmacy.
18 Q. And then 1 through 8?
19 A. Yes.
20 Q. There's no check stand in that store that would
21 printout with a 00?
22 A. No.
23 Q. Next number?
24 A. That would be transaction number.
25 Q. Well, so like in a row.

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1 A. It start with the number 1 transaction. This would
2 be the 283rd transaction.
3 Q. If there were such a register?
4 A. Yes.
5 Q. Is there anything else you can tell us of that number
6 alone that tells us it's fake or forged?
7 A. No. The 282 is fine.
8 Q. The 00 is a problem. The transaction is fine. What
9 about the 252?
10 A. 252, that is my checker number.
11 Q. In order to have your checker number be printed out
12 on a receipt, what would be required?
13 A. For my number to be used in that check stand at the
14 time this certain receipt was printed out.
15 Q. How would that number get put in the cash register?
16 Can anybody go up and log in 252?
17 A. No. You log in your number, 252, and I have a four
18 number pin code I would use, like a security code to access
19 the terminal.
20 Q. Is that a pin code you would keep to yourself?
21 A. Yes.
22 Q. Did you share that with others?
23 A. No. A year ago would be a hard time to go back and
24 remember whether I did or not. It's possible. Today, no.
25 Q. A year ago it's possible. How remote a possibility,

CERTIFIED COURT TRANSCRIPT

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1 remote or fair?
2 A. I would say fair. If I were to have somebody run up,
3 I was busy, I would give them the number. It would be
4 possible.
5 Q. Now, if it were you, could you have checked this out
6 on June 23rd at 11:49 p.m.?
7 A. No.
8 Q. Why not?
9 A. It's not hours of the day I'm working.
10 Q. You've never worked those hours of the day?
11 A. No, sir.
12 Q. Would you ever have sent anybody to the front to
13 check out with your pin number on that particular day?
14 A. No, sir.
15 MR. SAVAGE: Objection, he couldn't testify if he
16 wasn't there.
17 THE COURT: He's testified that he's never worked at
18 that hour at that store.
19 MR. LOW: Right.
20 Q. (BY MR. LOW) If somebody else used your number, they would
21 have had to have remembered your pin number from a prior time
22 when you said, "go log in for me?"
23 A. Yes, sir.
24 Q. Is that a normal or abnormal?
25 A. That's abnormal. To use my number would have been by

CERTIFIED COURT TRANSCRIPT

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2 Q. So it would have been against the rules?

3 A. Yes.

4 Q. Below it says birthday equals 01/2/75?

5 A. That would be for fireworks. It requires an age. It

6 will prompt where you need to ID them and put in a birth date.

7 Q. That is something typically put in on a receipt, like

8 alcohol?

9 A. Yes.

10 Q. Next one down, it says "Doc Otis?"

11 A. That would be the item description for whatever was

12 purchased.

13 Q. Some of us don't know what that is. What is that?

14 A. It's a malt beverage.

15 Q. How is it sold?

16 A. Brought from the shelf --

17 Q. No. Sold in six packs?

18 A. Six packs.

19 Q. Can you buy them individually as well?

20 A. Yes.

21 Q. But does the store have them in six packs on the

22 shelf?

23 A. Yes, sir.

24 Q. Does the price of 6.99; is that okay?

25 A. Yes, sir.

CERTIFIED COURT TRANSCRIPT

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2 A. I'm not sure.

3 Q. Does it show up on all of the receipts?

4 A. I'm not certain.

5 Q. We'll look in a minute. Below it has four asterisks

6 and then tax. That would be the tax?

7 A. Yeah.

8 Q. And BAL, is that balance?

9 A. Yes.

10 Q. 7.45?

11 A. Yes, total with the tax.

12 Q. And cash?

13 A. That is the form they paid.

14 Q. Change?

15 A. What they received back.

16 Q. Here is zero. Total item of numbers sold.

17 A. And that would be the one, "Doc Otis" item number

18 one.

19 Q. Let's talk about some of the things on the top. It

20 says "Albertson's Preferred Savings Card." Tell us what that

21 is?

22 A. That is a sales card that came out a little over a

23 year ago, club card savings on purchases.

24 Q. Do you remember the date particularly that that

25 program was enrolled?

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1 A. It would be 6/26/02.

2 Q. Prior to June 26, '02, would that have printed out on

3 the receipt?

4 A. No, sir.

5 Q. Showing you --

6 MR. LOW: Where are we at?

7 THE CLERK: 21.

8 Q. (BY MR. LOW) State's Exhibit Number 21 shown up there on

9 the left, what is that first of all? Do you know where you

10 obtained that?

11 A. That would have been from our records we keep

12 upstairs. That would be a receipt from that day shown on

13 there that we have kept up in a box in our compressor room.

14 Q. June 28?

15 A. Yeah.

16 Q. Just one side question. Do you keep all receipts for

17 years and years?

18 A. No. We do keep all of our credit transaction slips.

19 So occasionally if a checker that is done a void or certain

20 miscellaneous receipts, if the bookkeeper hangs onto them,

21 she'll throw them in that box also.

22 Q. You don't keep all of your sales receipts, but maybe

23 one on a void?

24 A. Yeah.

25 Q. Is it possible to go in any Albertson's and find a

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1 duplicate of what the defendant might claim was his receipt

2 from that night --

3 MR. SAVAGE: Objection. What do you mean "the

4 defendant might claim?" Mr. Low, this is exactly what we

5 objected to.

6 THE COURT: Sustained.

7 MR. LOW: Thank you, Judge.

8 Q. (BY MR. LOW) -- what a different witness would claim this

9 helped her remember this was the night. Would you be able to

10 pull a record of this receipt up anywhere?

11 A. It would be tough if you didn't work there to find

12 that receipt.

13 Q. I'm asking could you? Could you find that?

14 A. Yes.

15 Q. Is there such a receipt for the one on the right in

16 your records anywhere?

17 A. I'm uncertain.

18 Q. Would you be able to find such a thing?

19 A. Not a year back, I couldn't.

20 Q. How far back can you go?

21 A. 60 days?

22 Q. As of 60 days, what happens to these receipt.

23 A. They go into another database, which takes months to

24 find. The physical copy, if it happened and it was gone,

25 there would be no way.

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IN THE UTAH COURT OF APPEALS

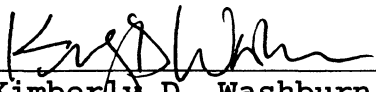
STATE OF UTAH,	:	
	:	CERTIFICATE OF SERVICE OF
Appellee/Plaintiff,	:	ADDENDUM TO APPELLANT'S BRIEF
	:	
vs.	:	
	:	Appeal Number 20030863CA
RON DENNIS SHEPHERD,	:	
	:	
Appellant/Defendant.	:	

ON APPEAL FROM THE CONVICTION AND JUDGMENT ENTERED BY THE FOURTH
JUDICIAL DISTRICT COURT, WASATCH COUNTY, STATE OF UTAH
HONORABLE DONALD J. EYRE PRESIDING

I hereby certify that I caused two (2) true and correct
copies of the foregoing ADDENDUM TO APPELLANT'S BRIEF to be
served, via first class mail, postage prepaid, upon the
following:

Matthew D. Bates, Esq.
Assistant Attorney General
Utah Attorney General
Appeals Division
Attorney for Appellee
160 East 300 South, 6th Floor
Salt Lake City, Utah 84114-0854

DATED this 25th day of May, 2004.



Kimberly D. Washburn